

When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate

David A. Koplow†

The tempest over the proposed “reinterpretation” of the Anti-Ballistic Missile Treaty¹ has only barely been stilled,² and the full

† Professor of Law, the Georgetown University Law Center. This article arises from a panel discussion on “Executive Branch Implementation of Arms Control Treaties” at the April 1991 Annual Meeting of the American Society of International Law. See *Proceedings of the 85th Annual Meeting, American Society of International Law* 483-506 (Apr 17-20, 1991). The author thanks John H. McNeill for his comments on an earlier draft of this article, and Marc S. Martin for his research assistance.

¹ Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 UST 3435, TIAS No 7503 (“ABM Treaty”).

² See Abram Chayes and Antonia Handler Chayes, *Testing and Development of “Exotic” Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 Harv L Rev 1956 (1986); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv L Rev 1972 (1986); Symposium, *Arms Control Treaty Reinterpretation*, 137 U Pa L Rev 1351 (1989). This controversy surfaced in 1984-85 when the Reagan Administration argued that the traditional interpretation of the coverage of the Anti-Ballistic Missile Treaty was too restrictive and, more dramatically, that the President could alter it unilaterally to permit additional development and testing activities under the Strategic Defense Initiative. Congress then reacted strongly to reassert its shared role in the treaty process, and the clash has bitterly divided its legislative and executive partisans. See *The ABM Treaty and the Constitution*, Joint Hearings Before the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, S Hrg 110, 100th Cong, 1st Sess (1987) (“ABM Treaty Hearings”); *The ABM Treaty Interpretation Resolution*, S Rep No 164, 100th Cong, 1st Sess (1987).

impact of the dissolution and reorganization of the Soviet Union is far from clear.³ But already we can detect early warnings about the next probable source of intense constitutional conflict between the American executive branch and the Congress in their ongoing struggle for primacy in the conduct of United States foreign relations. This imminent battle—again arising in the context of disarmament treaties, perhaps the most controversial and crucial aspect of America's international public policy—has not yet been fully joined. But unless some creative, mutually acceptable solutions can quickly be developed, this battle, too, threatens to become bitter, protracted, and ultimately destructive for the coordinated and consistent conduct of United States national security efforts in an era of profound global instability.

The spark this time arises from the fact that several recent international agreements limiting nuclear or other advanced weaponry purport to authorize the parties to modify some of their negotiated terms through informal mechanisms other than the traditional treaty amendment, thereby cutting the United States Congress out of the revision process. Initially, this novel approach may seem like an expedient, practical response to the growing modern problems of treaty complexity and over-specificity, allowing for some quick adaptation to rapidly changing geo-political circumstances. Moreover, its proponents affirm that the contemplated changes will be minor in nature, concerning only technical, administrative, or procedural points, not the underlying substance of the international obligations. Indeed, the limited experience to date has not suggested presidential abuse or deliberate circumvention of legitimate legislative processes. Nevertheless, the prospect of informal revision of such important documents is daunting, raising fundamental issues of international law and posing another troubling challenge to the constitutional framework of the separation of powers. As in the reinterpretation controversy, the issue is blunt: How far may the President lawfully go in twisting the terms of a ratified treaty without returning to the Senate for fresh advice and consent?

This Article dissects the legal and policy issues raised by this proposed avenue for creating new treaty terms. It offers a critique of the practice and some recommendations for constraining the danger before a constitutional crisis fully erupts. Section I presents

³ See John B. Rhinelander and George Bunn, *Who's Bound by the Former Soviet Union's Arms Control Treaties?*, 21 *Arms Control Today* 3 (Dec 1991) (principles of state succession suggest coverage of breakaway republics).

the background for the current controversy, describing a salient emerging problem besetting modern arms control agreements: the fastidious attention to verification procedures has led the negotiators to draft treaties that are so long, complex, and detailed that they are certain to become obsolete or simply erroneous in implementation. When dealing prospectively with such novel issues as the regulation of future weapons and the inspection and dismantling of production facilities, diplomats are inherently unable to foresee the future with perfect clarity. Yet their political masters (in both the Congress and the executive branch) have instructed them to leave no contingency untouched. The inevitable result is that disarmament treaties contain meticulous provisions that just don't work properly in practice and need to be modified, sometimes quickly.

Section II then describes the executive branch's recent efforts to deal prospectively with this problem of creeping obsolescence, through treaty terms that delegate to the President and the other state party a power to incorporate subsequent corrections informally and quickly into the ratified text. Seeking to avoid the requirement of returning to the Senate with "every little change" in treaty operations, the executive has stretched to preserve some flexibility to implement certain alterations unilaterally. In three major recent arms control agreements, the Senate has cautiously approved this novel experiment with "non-amendments,"⁴ and two important additional test cases are now pending before the legislature. Section II presents these five agreements and summarizes the initial practice under them.

Next, Section III of the Article considers the process of treaty modification from the perspective of international law. It concludes that on the sovereign-to-sovereign plane, countries may modify treaties through a variety of rigorous or casual mechanisms, so long as the parties manifest congruent intentions. International law does not insist upon the adoption of any formal amendment process, but rather permits states to create new law through routine

⁴ The term "non-amendment" is adapted from the colloquial arms control vocabulary, in which negotiating delegations sometimes interact through devices designated "non-papers" or "non-ideas." Those terms were originally invented in order to preserve the author's ability to retract or disavow the proposal quickly. Now, however, frequent usage has given the non-paper a more formal, recognized status. See, for example, Thomas Bernauer, *The Projected Chemical Weapons Convention: A Guide to the Negotiations in the Conference on Disarmament* 9 (United Nations Institute for Disarmament Research, 1990) ("Chemical Weapons Convention").

diplomatic procedures or even through unspoken behavior and tacit acquiescence.

Section IV turns to U.S. constitutional law, where the real constraints upon the treaty modification power will emerge. This analysis concludes that, despite executive branch assurances, and even assuming good faith on all sides, this new process cannot succeed. Ultimately, the executive branch's verbal guarantees are insufficient. A more reliable structure will have to be created to draw more clearly a tolerable boundary line between permissible modification and usurpation of a vital congressional role. Even if the informal revision process could, just barely, survive constitutional challenge, it incorporates a degree of untrammelled delegation of legislative powers that is unwise and dysfunctional.

Section V begins the process of constructing a more durable solution to the problems of imperfect arms control treaties, by suggesting a range of remedies that could be exercised. While no one of these mechanisms will suffice for all the problems of complexity and change in disarmament, together they may help deal with real problems as they arise, without unduly straining the constitutional scheme.

Finally, the Conclusion attempts to place this controversy into a larger context, comparing it to a country's occasional efforts to transfer to international institutions a bit of erstwhile national decisionmaking autonomy—to surrender a portion of national sovereignty in the name of advancing world order. That globalization process is generally a salutary step toward the creation of international stability and harmony, and domestic legal doctrines should not unduly constrain it.

In sum, the thesis of this Article is that executive branch efforts to wrest additional treaty-related powers from the Congress—whether undertaken in the blatant manner of the reinterpretation escapade or in the seemingly more benign, indirect style of the current non-amendment question—are dangerous and unwarranted. We should strive to create a viable solution to the emerging problem of treaty modification that inflicts less violence upon the constitutional scheme. Whether we are dealing with the U.S.S.R., the Commonwealth of Independent States, Russia, or some new conglomeration of other entities, the United States must remain true to its own legal institutions, even in times of global uncertainty and stress. Shared power over treaty creation and implementation has served us well for over two centuries; we should not quickly abandon the Constitution's plan.

I. THE PROBLEM OF OVERLY-PRECISE TREATIES

A. The Expansion of Arms Control Documents

Arms control used to be a fairly simple and straightforward process—at least for the drafters, if not for their political mentors. The 1925 Geneva Protocol⁵—still the single most important legal bulwark against the use of chemical weapons in international hostilities—is barely one page long.⁶ The 1959 Antarctic Treaty⁷—demilitarizing an entire continent and establishing a broad inspection scheme to verify compliance with its substantive obligations—runs to six pages.⁸ Both the Limited Test Ban Treaty⁹ (prohibiting all nuclear explosions except those conducted deep underground) and the Nuclear Non-Proliferation Treaty¹⁰ (creating the international regime retarding the spread of weapons of mass destruction) were likewise able to perform their tasks in only three and five pages, respectively.¹¹ Other early arms control agreements were similarly succinct.¹² Even the 1972 SALT I Agree-

⁵ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Jun 17, 1925, 26 UST 571, TIAS No 8061 ("Geneva Protocol"). Under the treaty, 130 countries have agreed not to use (or not to be the first to use) poison gas in war. See United States Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements: Texts and Histories of the Negotiations* 10, 16-19 (1990) ("ACDA Treaty Book").

⁶ ACDA Treaty Book at 15.

⁷ The Antarctic Treaty, Dec 1, 1959, 12 UST 794, TIAS No 4780 ("Antarctic Treaty"). The treaty provides among other things that Antarctica shall be used exclusively for peaceful purposes and it requires that all areas of the continent, including stations, equipment, and aircraft, be open for inspection by designated observers. Arts I, VII. The treaty has 37 parties. ACDA Treaty Book at 29-30.

⁸ ACDA Treaty Book at 23-28.

⁹ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug 5, 1963, 14 UST 1313, TIAS No 5433 ("LTBT"). The treaty confines nuclear explosions to deep underground locations where the released radioactive debris will not vent to the surface and pollute another nation's territory. The treaty has 116 parties. ACDA Treaty Book at 37-44, 48-51.

¹⁰ Treaty on the Non-Proliferation of Nuclear Weapons, Jul 1, 1968, 21 UST 483, TIAS No 6839 ("NPT"). The treaty prohibits any state that already possesses nuclear weapons from sharing them or the relevant technology and equipment with other states, and prohibits any state that does not yet have the weapons from seeking to develop or acquire them. The NPT is the cornerstone of the international effort to retard the proliferation of nuclear arms, and it has spawned a series of implementing agreements containing the details of inspection procedures. ACDA Treaty Book at 89-97, 223-27.

¹¹ ACDA Treaty Book at 45-47 (LTBT), 98-102 (NPT).

¹² See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan 27, 1967, 18 UST 2410, TIAS No 6347 ("Outer Space Treaty"); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb 11, 1971, 23 UST 701, TIAS No 7337 ("Seabeds Arms Control Treaty"); Convention on the Prohibition of the Development, Produc-

ments (the Anti-Ballistic Missile Treaty¹³ and the Interim Agreement on Strategic Offensive Arms¹⁴) were relatively brief and to the point, without volumes of details in the text or reams of fine-grained annexes—although one can begin to see the seeds of modern practice in the “agreed statements, common understandings, and unilateral statements” affixed to those two documents.¹⁵

By the mid-1970s, however, something had changed. Arms control treaties were no longer terse statements of agreed general policies; they were becoming instead detailed international codes

tion and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr 10, 1972, 26 UST 583, TIAS No 8062 (“BWC”). The Outer Space Treaty is the basic international law document regarding human activities outside the earth’s atmosphere, establishing principles that are adhered to by 98 countries. It is five pages long. *ACDA Treaty Book* at 52-63 (cited in note 5). The Seabeds Arms Control Treaty seeks to preempt possible arms races under the ocean, consistent with the novel technology being applied to the region and the territorial and economic interests that its 86 parties represent. It runs four pages. *Id* at 107-17. The BWC contains the basic international obligations to prevent biological warfare and to destroy existing stockpiles of biological agents and weapons. It has 107 parties and is five pages long. *Id* at 129-41. But see Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb 14, 1967, 634 UNTS 281 (“Treaty of Tlatelolco”). This treaty, seeking to preserve the entirety of Latin America as a region free of nuclear weapons, is substantially longer and more complicated than most of its contemporary arms control agreements. It is sixteen pages long, including two protocols. *ACDA Treaty Book* at 64-88.

¹³ The ABM Treaty starkly regulated the superpowers’ defensive systems, forestalling what would otherwise have become an expensive and destabilizing arms race. It defines the systems to be regulated and the activities that are prohibited. It is ten pages long. *ACDA Treaty Book* at 155-66 (cited in note 5).

¹⁴ Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 UST 3462, TIAS No 7504 (“SALT I Interim Agreement”). The Interim Agreement prohibited each party from initiating the construction of additional new fixed, land-based launchers for intercontinental-range ballistic missiles (ICBMs) and regulated the number of launchers for submarine-launched ballistic missiles (SLBMs). It also prohibited the parties from upgrading launchers for older or smaller missiles into the most modern, threatening types. It is eight pages long. *ACDA Treaty Book* at 167-76 (cited in note 5).

¹⁵ See *ACDA Treaty Book* at 162-66 (ABM Treaty had seven agreed statements, five common understandings, and four unilateral statements), 173-76 (Interim Agreement had five agreed statements, three common understandings, and four unilateral statements).

One can also see, in the Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Jul 3, 1974, 27 UST 1645, TIAS No 8276 (“ABM Protocol”), the precursor to another modern inconvenience: the necessity to amend a treaty relatively soon after it enters into force, when the parties quickly discover that their newly-negotiated document does not serve their common purposes as completely as they had anticipated. In the ABM Treaty case the parties agreed, only two years after concluding the original treaty, that they wanted to further reduce, from two to only one, the number of anti-ballistic missile sites that each would be authorized to retain. They then negotiated a protocol to that effect and shepherded it through their respective domestic ratification processes. *ACDA Treaty Book* at 181 (cited in note 5).

of conduct, specifying the precise obligations of the parties and nailing down in text all the ambiguities that had previously been left unexplored. Particularly in their procedures regarding mechanisms for verifying compliance with the substantive obligations, the newer treaties undertook to anticipate the wide range of future contingencies and to resolve the parties' respective rights and responsibilities prospectively, in order to forestall controversies before they actually emerged.

The 1974 Threshold Test Ban Treaty (TTBT),¹⁶ and especially its companion, the 1976 Peaceful Nuclear Explosions Treaty (PNET),¹⁷ were the vanguard of this new approach. The TTBT was four pages long,¹⁸ including a protocol that specified the precise types of geophysical and weapons-related data that the parties were to exchange.¹⁹ The PNET covered seventeen pages.²⁰ It included a technical appendix which specified, for the first time in an international disarmament agreement, details of the contemplated inspection algorithm: not only the mathematical formula for calculating the permissible number of inspecting personnel,²¹ but also matters as narrow as the scale of the maps that the inspectors could use ("1:24,000 or 1:25,000 with a contour interval of 10 meters or less"),²² the types of hand tools they could use (geologist's

¹⁶ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, Jul 3, 1974, 13 ILM 906 ("TTBT"). The treaty regulated the superpowers' conduct of underground nuclear weapons testing by confining each explosion to no more than the equivalent yield of 150 kilotons of TNT. The United States and the Soviet Union had specified that the TTBT would not enter into force until the companion PNET (see note 17) was also concluded. See *ACDA Treaty Book* at 184-90 (cited in note 5).

¹⁷ Union of Soviet Socialist Republics-United States: Treaty on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 15 ILM 891 ("PNET"). The treaty applies to nuclear explosions undertaken for purposes of civil engineering (to excavate a mine or harbor, to re-route a river, etc.), rather than for weapons development. It provides for reciprocal inspection of these "peaceful nuclear explosions (PNEs)," to ensure that no weapons-related activities are undertaken under civilian guise. *ACDA Treaty Book* at 191-210 (cited in note 5).

¹⁸ *ACDA Treaty Book* at 187-90.

¹⁹ These data included the geographic coordinates of each country's nuclear weapons testing sites and of two specified previous test explosions; the geology of each testing area within each site (including rock characteristics and the density, seismic velocity, water saturation, and porosity of the transmission media); and the yield, date, time, depth and geographic coordinates for two calibrating test explosions. TTBT, Protocol, ¶ 1.

²⁰ *ACDA Treaty Book* at 194-210.

²¹ PNET, Protocol, Art V, ¶ 6 (formula includes subcategories such as "the number of emplacement holes plus three" and "the number of explosives plus seven").

²² *Id.*, Art II, ¶ 4(c).

tools, kits of note-taking equipment, and field glasses),²³ and the step-by-step procedures for taking and sharing dual-print Polaroid-type photographs of the inspection area.²⁴

With that predicate, the 1979 SALT II Treaty²⁵ rose (or sank) to an even more punctilious degree of precision, weighing in at thirty-four pages.²⁶ It included ninety-eight agreed statements and common understandings, and explicitly noted that those interpretative details were to be considered in close conjunction with the main treaty—as were a shorter-duration protocol, a joint statement of principles on future negotiations, a memorandum of understanding establishing an agreed “data base” documenting each side’s initial arsenal of strategic weaponry, and a separate Soviet assurance regarding the production rate of the Backfire bomber.²⁷

The hypertrophy of treaty drafting has continued, and even accelerated, since SALT II. The 1987 Treaty on Intermediate-Range Nuclear Forces²⁸ (abolishing the superpowers’ arsenals of selected categories of nuclear missiles) is 105 pages long.²⁹ It is crammed with technical and operational details,³⁰ and its associated protocols and memoranda regarding inspection, dismantling,

²³ Id., Art IV, ¶¶ 1(b), 2 (defining the types of equipment that the inspectors could bring with them and the types that would be supplied to them by the host party).

²⁴ Id., Art III, ¶ 5 (detailing what types of cameras may be used, who will take the pictures, what subjects may be photographed, and who receives copies of the photographs).

²⁵ Union of Soviet Socialist Republics—United States: Treaty on the Limitation of Strategic Offensive Arms, Jun 18, 1979, 18 ILM 1112 (“SALT II Treaty”) (not in force). The treaty would have required the superpowers to reduce their arsenals of long-range nuclear weapons to a common ceiling, with sub-limits on various categories of arms. *ACDA Treaty Book* at 261-66 (cited in note 5).

²⁶ *ACDA Treaty Book* at 267-300.

²⁷ Id. See John H. McNeill, *U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer*, 79 Am J Intl L 52, 58 (1985) (describing the process of negotiating and drafting the various components of the SALT II package of documents).

²⁸ Union of Soviet Socialist Republics—United States: Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec 8, 1987, 27 ILM 84 (“INF Treaty”). The treaty applies to ballistic and cruise missiles with ranges between 500 and 5,500 kilometers. Id., Art II, ¶¶ 5-6. It has required thorough dismantling of the existing stockpiles of both countries, under a verification regime of unprecedented intrusiveness. Daniel Sneider, *Soviets Destroy Last Intermediate-Range Nuclear Missiles*, Christian Sci Mon 5 (May 14, 1991).

²⁹ *ACDA Treaty Book* at 350-454 (cited in note 5).

³⁰ See, for example, Protocol on Procedures Governing the Elimination of Missile Systems Subject to the INF Treaty (the “Elimination Protocol”), Art II, ¶ 10, which detailed the particular steps for dismantling each type of weapon and support system covered by the treaty. For example, the document specified six exacting procedures for destroying a launcher for a Soviet SS-12 missile, including the requirements that “launcher leveling supports shall be cut at locations that are not assembly joints into two pieces of approximately equal size” and “a portion of the launcher chassis, at least 1.10 meters in length, shall be cut off aft of the rear axle.” Id.

and data reporting procedures could fill a small book.³¹ The 1990 Conventional Forces in Europe Agreement³² (reducing the NATO and Warsaw Pact deployments of tanks, aircraft and other equipment throughout Europe) does, in fact, fill a small book,³³ and the initial data exchange prompted by it has generated several more.³⁴ The Chemical Weapons Convention,³⁵ now under development in the Conference on Disarmament (a Geneva-based forty nation negotiating body affiliated with the United Nations), promises to dwarf all its predecessors. As of August, 1991, it was 154 pages long, with reams of technical details still to be agreed upon and reduced to text.³⁶ Just as dramatically, when the United States and

³¹ See Elimination Protocol, Protocol Regarding Inspections Related to the INF Treaty, and Memorandum of Understanding Regarding the Establishment of the Data Base for the INF Treaty. The parties also exchanged large-scale photographs of all the relevant types of weapons, as well as site diagrams of the facilities where they were located. In addition, the INF Treaty required the negotiation and effectuation of a series of other international agreements, to provide American and Soviet inspectors ready access to military installations inside the territories of European allies. Belgium, Federal Republic of Germany, Italy, Netherlands, United Kingdom, U.S., Agreement Regarding Inspections Relating to the Treaty Between the U.S. and the U.S.S.R. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec 11, 1987, 27 ILM 58.

³² Treaty on Conventional Armed Forces in Europe, Nov 19, 1990, 30 ILM 1 ("CFE Treaty") (not in force).

³³ The CFE Treaty and subsequent accords have not yet been printed in the same format cited earlier, so it is impossible to make exact comparisons of the numbers of pages. It is clear, however, that the CFE Treaty is much longer and more detailed than even the INF Treaty, the previous record-holder.

³⁴ CFE Treaty, Art XIII and Protocol on Notification and Exchange of Information (cited in note 32); Lee Feinstein, *The Case for CFE*, 21 Arms Control Today CFE Supp 2, 3 (Jan/Feb 1991) (describing the series of data exchanges to occur annually and at other points during the treaty's life).

³⁵ Conference on Disarmament, Report of the Ad Hoc Committee on Chemical Weapons, Appendix I (Aug. 27, 1991) (current "rolling text" of draft chemical weapons convention now under negotiation) ("CW Convention Rolling Text").

³⁶ Id. The Chemical Weapons Convention would be a comprehensive, global agreement to abolish chemical weapons agents and delivery systems, as well as the facilities designed to produce and store them. It would entail inspections of unprecedented depth and frequency, with foreign personnel licensed to enter and study private chemical-related factories in the United States and around the world, to verify that no impermissible weapons-related activities were underway. Bernauer, *Chemical Weapons Convention* (cited in note 4); Edward A. Tanzman and Barry Kellman, *Legal Implications of the Multilateral Chemical Weapons Convention: Integrating International Security with the Constitution*, 22 Intl L & Politics 475 (1990).

Also relevant in this context is the bilateral United States-Soviet Union chemical weapons agreement, Agreement Between the United States of America and the Union of Soviet Socialist Republics on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons, Jun 1, 1990, 29 ILM 932. It provides for dismantling of the bulk of the two nations' chemical arsenals, cooperative inspections, and other joint efforts to spur the multilateral negotiations. The agreement was signed on June 1, 1990, but has not entered into force, in part because the

the Soviet Union agreed in 1990 on two protocols to modify the TTBT and PNET³⁷—a relatively modest effort to augment the already-impressive verification provisions of those earlier agreements³⁸—the new protocols expanded to consume far more pages than either of the basic treaties had originally contained.³⁹ The new START agreement⁴⁰ is the most monstrous agreement yet finalized. It, too, is laden with technical minutiae and novel, guaranteed-to-be-obsolete verification details.⁴¹

B. Rationales for Proliferating Details

Why has this explosion occurred? What are the drafters of modern treaties attempting to do that the earlier generations of arms control negotiators found unnecessary? How has arms control

parties were still working on a detailed verification protocol to attach to it. See Jozef Goldblat and Thomas Bernauer, *The US-Soviet Chemical Weapons Agreement of June 1990: Its Advantages and Shortcomings*, 21 Bull Peace Proposals 355 (1990).

³⁷ Union of Soviet Socialist Republics-United States: Verification Protocol to the Treaty on the Limitation of Underground Nuclear Weapon Tests, Jun 1, 1990, 29 ILM 969 ("1990 TTBT Protocol"); Union of Soviet Socialist Republics-United States: Verification Protocol to the Treaty on Underground Nuclear Explosions for Peaceful Purposes, Jun 1, 1990, 29 ILM 1025 ("1990 PNET Protocol").

³⁸ The TTBT and PNET had not previously entered into force because the Carter Administration had hoped to supersede them with a comprehensive test ban treaty (abolishing all nuclear explosions in all environments) and because the Reagan Administration had considered the treaties' existing verification provisions to be inadequate. David A. Koplow and Philip G. Schrag, rapporteurs, *Phasing Out Nuclear Weapon Tests: The Belmont Conference on Nuclear Test Ban Policy*, 26 Stan J Intl L 205, 210-11 (1989).

³⁹ The 1990 protocols do not contain any additional substantive restrictions on the conduct of nuclear tests. Instead, they augment the verification arrangements by providing for closer, more exacting on-site inspection of the locations where nuclear explosions are scheduled to occur, and by permitting the inspecting party to utilize advanced seismic and hydrodynamic monitoring apparatus at short range. *Verifying Testing Treaties—Old and New*, 20 Arms Control Today 3 (Jul/Aug 1990) (interview with Ambassador C. Paul Robinson); Wolfgang K.H. Panofsky, *Verification of the Threshold Test Ban*, 20 Arms Control Today 3, 5-6 (Sep 1990).

⁴⁰ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, Jul 31, 1991 (on file with U Chi L Rev) ("START Agreement") (not in force).

⁴¹ The START Agreement will require the United States and the former Soviet Union to reduce their stockpiles of strategic nuclear forces to equal, greatly-reduced ceilings. Unlike the INF Treaty—in which the regulated weapons were banned altogether, so a party detecting even one residual missile would have certain knowledge of a violation—the START accord will permit each side to retain substantial quantities of the regulated arms. The task of verifying compliance, therefore, will include the more difficult challenge of counting, locating, and reliably identifying the "legal" missiles, to ensure that each is accounted for at all times. James R. Blackwell, *Contributions and Limitations of On-Site Inspection in INF and START*, in Lewis A. Dunn, ed, *Arms Control Verification and the New Role of On-Site Inspection* 95, 106-19 (Lexington, 1990).

progressed (or fallen) into a situation where the parties are compelled to spell out so many of the details in the treaty text?

The collision of two intractably opposing factors has created this untenable situation. First, Congress and the Reagan and Bush administrations have repeatedly exhibited a preternatural fascination with treaty detail. They have insisted that the basic accord itself spell out with precision all the operational mechanics of treaty operation and verification, as a bulwark against Soviet or other treachery through the exploitation of loopholes. Second, the treaty negotiators have simply been unable to anticipate accurately every nuance of future practice and every potential spin of advancing technology. This leaves them to make little more than educated guesses about what sorts of inspection mechanisms will prove to be feasible and effective. In this situation, error—sometimes quite important error—is inevitable.

It is difficult to trace with certainty the roots and the sponsors of the current fastidious attention to the details of disarmament, and of the necessity for writing those details into the treaty itself. Prominent among the originators of the trend was Senator Henry "Scoop" Jackson (D-Wash), who became the leading congressional critic of the SALT I accords and the most prominent legislative force influencing the SALT II negotiations.⁴² Jackson complained about ambiguities and omissions in the 1972 Interim Agreement, often with telling political clout. For example, he and others noted that one key goal of the Interim Agreement was to establish a special regime for limiting the largest and most powerful category of "heavy" ICBMs in the Soviet missile fleet.⁴³ To that end, the documents prohibited existing missile silos from being "significantly increased" in size.⁴⁴ A formal "common understanding" reflected the parties' concurrence that this term meant that any growth could be "not greater than 10-15% of the present dimensions" of the silos.⁴⁵

⁴² Michael Krepon, *The Politics of Arms Control Treaty Ratification* 13-14 (Henry L. Stimson Center, Jan 1991) (on file with U Chi L Rev); Strobe Talbott, *Deadly Gambits: The Reagan Administration and the Stalemate in Nuclear Arms Control* 215-16 (Knopf, 1984). Senator Jackson ultimately voted for the SALT I accords, but only after inserting the "Jackson Amendment," mandating that future arms control negotiations should ensure equality between the United States and the Soviet Union in key strategic weaponry. Pub L No 92-448 § 3, 86 Stat 746, 747 (1972).

⁴³ John B. Rhineland, *The SALT I Agreements*, in Mason Willrich and John B. Rhineland, eds, *SALT: The Moscow Agreements and Beyond* 125, 145 (Free Press, 1974); Gerard Smith, *Double Talk: The Story of SALT I* 359, 388, 413 (University, 1985); Talbott, *Deadly Gambits* at 215.

⁴⁴ SALT I Interim Agreement, Agreed Statement C, 23 UST at 3478 (cited in note 14).

⁴⁵ *Id.*, Common Understanding A.

As Jackson noted, however, even this specification was inadequate, because if a three-dimensional structure could be increased 10-15% *in each dimension*, then the resulting increase in the total volume of the silo would be much larger, and the provisions would not effectively bar significant upgrades in silo size and missile capability.⁴⁶

Even more telling, Jackson pointed out that the negotiators of the Interim Agreement had never succeeded in securing Soviet agreement on the fundamental definition of a "heavy" missile, and that only a United States unilateral statement expressed a view about the prohibited sizes.⁴⁷ When the U.S.S.R. later manufactured a new type of middle-sized missile, larger than any previous "light" missile, but smaller than any previous "heavy" missile, the United States was unable to mount a serious legal challenge.⁴⁸ Jackson and other critics concluded that details of these sorts could not be left dangling, but must be resolved explicitly and comprehensively through the text of the treaty.⁴⁹

Senator Jesse Helms (R-NC) subsequently picked up much of the Jackson legacy in this area, subjecting recent arms control agreements to a painstaking, point-by-point review.⁵⁰ For example, although in the final analysis he was able to marshal only four

⁴⁶ Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms, Hearing before Senate Committee on Armed Services, 92d Cong, 2d Sess 341-43, 432-33 (1972); John B. Rhineland, *Arms Control in the Nuclear Age*, in John N. Moore, Frederick S. Tipson, and Robert F. Turner, eds, *National Security Law* 551, 608-09 (Carolina Academic, 1990); Soviet Compliance with Certain Provisions of the 1972 SALT I Agreements, Hearing before the Subcommittee on Arms Control of the Senate Armed Services Committee, 94th Cong, 1st Sess 6-19 (1975) ("Soviet Compliance Hearing").

⁴⁷ In SALT I, a unilateral statement was used to record one side's position or interpretation, where the other side did not concur. In Unilateral Statement D, the United States noted that it would consider as a heavy missile any new type of missile that had a volume significantly greater than the largest type of light missile then operational. The U.S.S.R. did not accept that interpretation. Interim Agreement, Unilateral Statement D (cited in note 14); Smith, *Double Talk* at 388-90 (cited in note 43), 400. See Restatement of the Foreign Relations Law of the United States § 301, Comment c (1986) (unilateral statement may have legal consequences under international law).

⁴⁸ Smith, *Double Talk* at 460 (cited in note 43); ABM Treaty Hearings at 469 (cited in note 2); Soviet Compliance Hearing at 6-9 (cited in note 46).

⁴⁹ Smith, *Double Talk* at 460-61; Soviet Compliance Hearing at 6-19; ABM Treaty Hearings at 469.

⁵⁰ When Senator Helms announced, in April 1991, that he was prepared to support the CFE Treaty, his endorsement was seen as a major boost for the ratification effort, providing "a respite from the spectacle of Helms's previous flamboyant public allusions at hearings of the Senate Foreign Relations Committee to secret government information proving the folly of arms control deals with communists." R. Jeffrey Smith, *Helms, Soviets See Eyeball to Eyeball*, Wash Post A17 (Apr 23, 1991).

allies in his opposition to the INF Treaty,⁵¹ his efforts (along with those of others) did result in significant delay.⁵² His tenacity also posed a credible threat of "killer amendments" that might have scuttled the accord.⁵³ And they required the executive branch to return to the Soviets, even after the treaty was signed, to clarify at least ten additional points that the negotiators had left obscure, such as the treaty's coverage of possible future types of INF technology and selected details of the inspection and dismantling procedures.⁵⁴

Ronald Reagan is also a key part of the story. His instinctual distrust of the Soviet Union led him to insist upon iron-clad inspection provisions.⁵⁵ His famous refrain, "trust, but verify,"⁵⁶ became the working motto of the bureaucracy. Many skeptical observers have suggested that the penchant for exactitude in verification—demonstrated not only by Reagan, but even more by his senior staff and other key policy makers⁵⁷—was driven not so much by a sincere desire to conclude workable disarmament treaties, but by the cynical calculation that the Soviet Union would

⁵¹ 100th Cong, 2d Sess, in 134 Cong Rec 6937 (May 27, 1988).

⁵² Paul Bedard, *Senate Prohibits Reinterpretations, Nears Treaty OK*, Wash Times A6 (May 27, 1988); Warren Strobel, *Nunn, Byrd Pressure Shultz with INF Delays*, Wash Times A4 (Feb 10, 1988). The Senate voted its consent to the INF Treaty only after President Reagan had already flown to Moscow for the start of the summit meeting at which the instruments of ratification were formally exchanged, a source of some embarrassment for Reagan. David C. Morrison, *A Slow Lift-Off for the INF Pact*, Natl J 1136 (Apr 30, 1988).

⁵³ Jesse James, *Senate Approves Ratification of Historic INF Treaty*, 18 Arms Control Today 22 (Jul/Aug 1988); R. Jeffrey Smith, *Senate Panel Backs INF Report*, Wash Post A4 (Apr 18, 1988).

⁵⁴ *ACDA Treaty Book* at 447-52 (cited in note 5) (text of May 12, 1988 "agreed minutes" and diplomatic notes); Michael R. Gordon, *U.S. and Soviets Say Missile Pact Issue Has Been Resolved*, NY Times A1 (May 13, 1988); Helen Dewar, *Senate Nears Debate on INF Treaty*, Wash Post A1 (May 14, 1988). See also *INF Missile Treaty Wins Senate Approval*, 44 Cong Q Almanac 379, 387 (1988) (describing INF Treaty modification proposals by Richard N. Perle, former aide to Senator Jackson, and later Assistant Secretary of Defense, who argued that the treaty contained unacceptable loopholes permitting Soviet exploitation).

⁵⁵ See Ronald Reagan, *Message to the Congress* (Feb 1, 1985), reprinted in U.S. Department of State, *Soviet Noncompliance with Arms Control Agreements*, Special Rep No 122, 1-2 (Feb 1, 1985) (stressing the importance of strict compliance with all provisions of arms control agreements and noting that American objectives in ongoing negotiations focus on verification demands); Joseph G. Whelan, *Andropov and Reagan as Negotiators: Contexts and Styles in Contrast*, Cong Res Service Rep No 83-141S, 93 (Jun 30, 1983) (Reagan stressed patience in negotiations with the Soviet Union, and precision in drafting agreements).

⁵⁶ David Braaten, *Reagan Describes Arms Talks*, Wash Times A4 (Jan 12, 1990); Bruce Van Voorst, *Arms Control: An Exercise in Trust*, Time 24 (Jul 31, 1989).

⁵⁷ Rhinelander, *Arms Control in the Nuclear Age* at 624-26 (cited in note 46); Talbott, *Deadly Gambits* at 66, 272 (cited in note 42).

continue to resist, as it traditionally had, any American demands for significant arms reductions and intrusive inspection.⁵⁸ In that minuet, some concluded, the United States could appear to the world community to be actively pursuing arms control, the blame for any failures would be attributed to the closed nature of Soviet society, and the Reagan program of massive defense buildups could continue unimpeded.⁵⁹

In any event, the emergence of Mikhail Gorbachev and the promulgation of *glasnost* and *perestroika* signaled a new era in arms control, initiating a phase in which previously unimagined verification schemes suddenly became plausible.⁶⁰ Whether or not the Reagan lieutenants were nonplussed by Moscow's acceptance of their hard-line terms, they instructed negotiators to craft documents of surpassing detail and precision, to put newfound Soviet openness to the test.⁶¹

Beyond the impact of these personalities, Congress has by legislation directed more concerted attention to the details of treaty drafting. The 1972 Case-Zablocki Act,⁶² requiring the Secretary of State promptly to transmit to the Congress a copy of every international agreement signed on behalf of the United States,⁶³ reflects a concern that secret agreements might otherwise escape legislative scrutiny.⁶⁴ Also, Section 33 of the Arms Control and Disarmament

⁵⁸ Thomas Risse-Kappen, *The Zero Option: INF, West Germany, and Arms Control* 168-69 (Westview, 1988); Talbott, *Deadly Gambits* at 272 (cited in note 42).

⁵⁹ See generally Alva Myrdal, *The Game of Disarmament: How the United States and Russia Run the Arms Race* (Pantheon, 1976) (arguing that the superpowers have traditionally merely feigned an interest in arms control, while they continue their weapons buildups).

⁶⁰ Rhinelander, *Arms Control in the Nuclear Age* at 627 (cited in note 46).

⁶¹ Kenneth L. Adelman, *Verification in an Age of Mobile Missiles* (address before the City Club in San Diego, Jun 26, 1987), reprinted in 87 Dept State Bull 27, 30 (Sep 1987) (Adelman, Director of the United States Arms Control and Disarmament Agency, predicted that "[o]ne test of openness will be whether the Soviets are willing to accept the verification provisions we are proposing in the agreement on [INF]"); Statement by President Reagan on the Nuclear and Space Arms Talks, May 7, 1986, reprinted in U.S. Arms Control and Disarmament Agency, *Documents on Disarmament* 225, 226 (Public Affairs Office, 1986) ("We are seeking to put these Soviet pronouncements [about the value of effective verification] to the test at the negotiating table.").

⁶² Pub L No 92-403, codified at 1 USC § 112b (1988). See 22 CFR § 181 (1991) (establishing internal executive branch procedures to ensure compliance with statutory reporting requirements).

⁶³ Treaties, of course, were already being sent to the Senate for its consideration for advice and consent prior to ratification, but international agreements other than treaties (commonly referred to as "executive agreements") were not always provided to either chamber.

⁶⁴ International Agreements—Transmission to Congress, HR Rep No 92-1301, 92d Cong, 2d Sess (Aug 3, 1972) (to accompany S 596), in 1972 USCCAN 3067, 3068. See *State Department Airgram to All Diplomatic Posts Concerning Criteria for Deciding What Con-*

Act⁶⁵ asserts that any agreement that "will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States" could be effectuated only pursuant to the treaty-making power or through bicameral legislation.⁶⁶ Congress thereby attempted to exclude "sole executive agreements" as a major tool of arms control, and to preserve a fundamental role for the legislature in reviewing the terms of an accord.⁶⁷ In addition, the Derwinski Amendment⁶⁸ inserts Congress still further into the pre-signature negotiation of disarmament pacts. It mandates that the Director of the Arms Control and Disarmament Agency report promptly to the Congress about "each element of any significant arms control proposal made to a foreign country by the United States, or made to the United States by a foreign country," together with an assessment of the verifiability of the proposal.⁶⁹

Today, at least some experts have wistfully suggested turning back the clock on this degree of detail in treaty drafting, and au-

stitutes an International Agreement (Mar 9, 1976), reprinted in Thomas M. Franck and Michael J. Glennon, *Foreign Relations and National Security Law: Cases, Materials and Simulations* 389 (West, 1987) (specifying types of detailed international agreements required to be reported to Congress). See also *Treaties and Other International Agreements: The Role of the United States Senate*, S Rpt No 98-205, 98th Cong, 2d Sess 22 (Congressional Research Service, 1984) ("Role of the Senate"); David J. Kuchenbecker, *Agency-Level Executive Agreements: A New Era in U.S. Treaty Practice*, 18 Colum J Transnatl L 1, 64-69 (1979); Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive* 127-29 (NYU, 1984) (describing so-called "agency agreements", international agreements concluded on behalf of the United States by non-diplomatic personnel).

⁶⁵ Pub L 87-297 § 33, codified at 22 USC § 2573 (1988).

⁶⁶ *Id.*

⁶⁷ See text accompanying note 278; Restatement at § 303 (cited in note 47) (defining three types of international agreements other than treaties, and noting congressional attempts to limit their use); Note, *Legal Implications of Deferring Ratification of SALT II*, 21 Va J Intl L 747, 778-82 (1981) (applying § 33 to a major arms control agreement); Kenneth C. Randall, *The Treaty Power*, 51 Ohio St L J 1089, 1116 (1990) (assessing the constitutionality of the provision).

⁶⁸ Pub L No 95-108 § 4, codified at 22 USC § 2577 (1988).

⁶⁹ *Id.* See HR Conf Rep No 95-563, 95th Cong, 1st Sess (Aug 3, 1977) (to accompany HR 6179), in 1977 USCCAN 1684, 1692. In adopting the new provision, the Conference Committee noted "that the provision is not intended to interfere with the President's ability to conduct arms control negotiations but is intended to emphasize the responsibility of ACDA and other executive branch agencies to keep the Congress informed with respect to the verifiability of significant arms control proposals." *Id.* at 1693.

thorities both inside⁷⁰ and outside⁷¹ of government have called for a simpler, more expeditious negotiation and agreement process, unencumbered by this welter of specificity.⁷² The government bureaucracy, however, has not been stayed from its assigned task. It continues to work the arms control issues with a passion for detail and a fear that congressional or other critics will comb the negotiated document for omissions or latent ambiguities.⁷³ Negotiators who get blamed for loopholes quickly discern the advantages of attending to each possible nuance, even at significant cost and delay.⁷⁴

⁷⁰ See Kenneth L. Adelman, *Arms Control With and Without Agreements*, 63 Foreign Affairs 240, 258-60 (Winter 1984/85) (proposing that arms control might progress more expeditiously through the use of informal, even unwritten agreements on broad principles, unencumbered by the welter of specificity); Robert Einhorn, *Revising the START Process*, 32 Survival 497 (Nov/Dec 1990) (favoring smaller, more frequent arms control agreements); Paul Bedard, *Soviet Leader's Ability to Slash Arms Doubted*, Wash Times A3 (Oct 8, 1991) (American officials are not eager to try to convert into written treaties the recent US and Soviet exchanges of unilateral arms reductions; attempting to do so might slow down the pace of reform.).

⁷¹ Michael Krepon and Sidney N. Graybeal, *Dealing with Future Treaty Implementation and Compliance Questions*, in Elizabeth Kirk, ed, *Technology, Security and Arms Control for the 1990s* 239, 240 (American Association for the Advancement of Science, 1988) ("The growth in complexity, Congressional involvement and bureaucracy does not bode well for those who approve of arms reductions but also believe in Murphy's Law."). David A. Koplow, rapporteur, *Conference Report: Executive-Congressional Relations and the Treaty Ratification Process* 11, 21 (Woodrow Wilson International Center for Scholars and Henry L. Stimson Center, Jan 17-18, 1991); Michael Nacht, Jay Winik and Alan Platt, *What About Arms Control?*, Wash Post C3 (Sep 22, 1991) (Middle East peace process should not be dependent upon formal arms reduction treaty); Sharon A. Squassoni, *Workshop Report: The Future of Arms Control* 9 (Science Applications International Corporation, Sep 13, 1991) (detailed inspection rights are not always necessary or desirable).

⁷² There have been important recent applications of the concept of pursuing arms control without formal, written treaties. Gerald Segal, *Informal Arms Control: The Asian Road to Conventional Reductions*, 19 Arms Control Today 16 (May, 1989). See text accompanying notes 119-32.

⁷³ Note, *Constitutional Limits on the President's Power to Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations*, 78 Georgetown L J 1983, 2024 n 154 (1990) (Senate gave the INF Treaty more attention than any previous arms control agreement).

⁷⁴ In discussing the delays resulting from the Senate's detailed evaluation of the INF Treaty, Senator Robert C. Byrd (D-W Va) commented:

If there is a hole in this treaty, it is not my fault; that is the fault of the Administration and its negotiators who failed to do their homework. If there is a problem there, that is their problem

Morrison, Natl J at 1136 (cited in note 52). See also The INF Treaty, Hearings before the Senate Committee on Foreign Relations, 100th Cong, 2d Sess, Part 1 at 166-67 (Jan 25-28, 1988) (Ambassador Kampelman testifying that, after observing the Senate debates on the ABM Treaty reinterpretation, the United States delegation to the INF Treaty talks resolved to become even more careful about ambiguous language in the evolving treaty text, to try to eliminate uncertainty).

Congressional participants, too, apparently continue to see a premium in developing a reputation for keen-eyed mastery of the technical interstices in arms control debates. Leaders such as Senators Sam Nunn (D-Ga),⁷⁵ Joseph Biden (D-Del),⁷⁶ and John Glenn (D-Ohio)⁷⁷ have emerged with a consistent orientation toward careful inspection of the details of a proffered agreement. Arms control documents excite frequent, searching review and appraisal within the House of Representatives, too.⁷⁸ A plethora of committees now operates in the arms control arena, and a significant new disarmament agreement would normally be vetted through at least six panels (plus subcommittee consideration): Foreign Relations/Affairs, Armed Services, and Intelligence in each chamber.⁷⁹ A standing informal "Arms Control Observer Group" also allows members to organize for informational briefings and to visit the negotiating delegations overseas.⁸⁰

Moreover, other countries seem recently to have adopted a similar bias toward detail in arms control drafting. For example, although earlier generations of Soviet diplomats had consistently resisted American efforts to import additional precision into the treaty text,⁸¹ at least one veteran U.S. negotiator reports that after

⁷⁵ Krepon, *Treaty Ratification* at 13-14 (cited in note 42) (Senator Nunn plays a pivotal role in contemporary defense debates).

⁷⁶ Senator Biden emerged as a key player in the debates on the reinterpretation of the ABM Treaty and on the ratification of the INF Treaty, sponsoring Senate resolutions or conditions that addressed the separation of powers issues directly. See Joseph R. Biden and John B. Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U Pa L Rev 1529 (1989).

⁷⁷ See Robert L. Beckman, *Nuclear Non-Proliferation: Congress and the Control of Peaceful Nuclear Activities* 252, 287 (Westview, 1985) (describing Senator Glenn's role in developing new legislation related to nuclear non-proliferation).

⁷⁸ Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich J Intl L 406, 408 (1989) (House members consistently resent their exclusion from the treaty-making process and attempt to involve themselves in international issues).

⁷⁹ In 1988, senior officials of the United States Arms Control and Disarmament Agency appeared before Congress on twenty-seven occasions for hearings or briefings. These included presentations before members or staff of all six committees, covering a wide range of arms control questions. U.S. Arms Control and Disarmament Agency, 1988 Annual Report, S PRT No 101-67, 101st Cong, 1st Sess 143-44 (1989).

⁸⁰ *Arms Control: Negotiations but No Accords*, 41 Cong Q Almanac 175 (1985). See also McNeill, 79 Am J Intl L at 63-64 (cited in note 27) (Congressional participation in the arms control process has grown, with members frequently visiting the negotiating delegations and helping to shape positions adopted by the United States). Senators were not allowed to participate, even as observers, in the SALT I negotiations. Treaty on Limitation of Anti-Ballistic Missile Systems, Exec Rep No 28, 92d Cong, 2d Sess 2 (1972).

⁸¹ The traditional dynamic of superpower arms control negotiations had usually seen the United States pushing for inclusion in the document of additional details of the verification regime, with the Soviet Union generally resisting those demands. Warren Heckrotte, *A Soviet View of Verification*, 42 Bull Atomic Scientists 12 (Oct 1986).

the various ABM Treaty episodes, the Soviets apparently decided to follow the American lead about the value of specificity.⁸²

The basic rationale for this attention to precision—especially for belaboring the treaty text with so many of the details—can be stated succinctly. First is the argument that sound, effective verification is essential to the arms control process. No country would prudently reduce its own level of armaments unless it was confident that its potential adversaries were honoring the reciprocal restraints.⁸³ Adequate verification, therefore, intends to deter potential cheaters, to deny them the anticipated value of any surreptitious violations, and to uphold the international rule of law demanding point-by-point fealty to agreed obligations.⁸⁴

Second, the early arms control agreements were too lax. They invited exploitation by the Soviet Union or others, and left the United States without effective legal recourse for vindicating national legal rights.⁸⁵ The loopholes in the SALT I Interim Agreement,⁸⁶ the lack of verification rigor in the Biological Weapons

⁸² The American Society of International Law, Proceedings of the 85th Annual Meeting 496-97 (Apr 17-20, 1991) ("1991 ASIL Proceedings") (remarks of Thomas Graham, Jr.). See also Roland M. Timerbaev, *A Soviet Official on Verification*, 40 Bull Atomic Scientists 8, 8 (Jan/Feb 1987) (leading Soviet arms control delegate asserted that "the Soviet Union is open to verification and that we are interested in it no less than others"). Even more recently, some Soviet experts seemed to have come full circle, suggesting that the exquisite drafting of recent arms control agreements had become dysfunctional. See David C. Morrison, *Back on Course*, Natl J 2074, 2077 (Aug 31, 1991) (then-Soviet Foreign Minister Alexander A. Bessmertnykh described the START agreement as "fantastically complex" and mused that it might be "the last treaty of its kind").

⁸³ See Arms Control and Disarmament Act § 37 (The Derwinski Amendment) (cited in note 68) ("It is the sense of the Congress that adequate verification of compliance should be an indispensable part of any international arms control agreement."); *Arms Control and National Security: An Introduction* 139 (Arms Control Association, 1989).

⁸⁴ See *Soviet Noncompliance with Arms Control Agreements*, U.S. Government report to Congress (Feb 6, 1991) ("Soviet Noncompliance Report") (on file with U Chi L Rev); Philip J. Farley, *How to Negotiate a Treaty*, 43 Bull Atomic Scientists 33, 34 (Oct 1987); Manfred Eimer and Edward J. Lacey, *Arms Control Verification Demands Resources, Resolve*, Signal 29 (Dec 1991).

⁸⁵ Critiques of American arms control negotiators often included the allegation that Soviet diplomats were more patient, firm, and focused, permitting them significant advantages in working the text toward their national objectives. Warren Strobel, *Mistakes Feared as Arms Negotiators Rush To Summit*, Wash Times A3 (Apr 6, 1988); Kenneth L. Adelman, *Negotiating Arms Reductions—Six Principles*, ACDA Occasional Papers (Jan 21, 1987); Arthur J. Goldberg, *Negotiating with the Kremlin*, Christian Sci Mon 22 (Oct 7, 1985).

⁸⁶ See text accompanying notes 42-49.

Convention,⁸⁷ and the potential evasion scenarios of the TTBT⁸⁸ were all seen as failures of the negotiators, who should have dealt more carefully and comprehensively with the sources of the later problems.

Finally, supporters of finely detailed treaties argued that the Soviet Union and other rogue states were consistently willing to violate arms control accords⁸⁹ and, more subtly, to exploit them by seizing upon every possible vagary or imprecision.⁹⁰ A special argument in this respect was the allegation that Soviet negotiators were adept at drafting vague "agreements in principle" that sounded fine, but did not include the operational details necessary to make them truly effective. If the United States nibbled at this type of ephemeral accord, in the hope that the necessary details could later be derived in practice consistent with the "spirit" of the agreement, it would eventually discover that the anticipated follow-up consensus was never forthcoming. Therefore, unless the United States insisted at the outset on nailing down sufficient details to elaborate any agreement in principle, the Soviets would evade meaningful commitments on the intricacies of the verification functions.⁹¹

⁸⁷ The Biological Weapons Convention contains no provisions on verification; the implicit understanding is that each party will utilize its own monitoring mechanisms. This posture was initially acceptable to the United States because biological weapons were considered not to have appreciable military utility, and the United States had unilaterally disposed of its entire arsenal even before the BWC was concluded. *ACDA Treaty Book* at 130 (cited in note 5). Since 1972, however, certain controversies have arisen regarding compliance with the treaty, see Elisa D. Harris, *Sverdlovsk and Yellow Rain: Two Cases of Soviet Noncompliance?*, 11 *Intl Security* 41 (Spring 1987), and some have called for amendment of the BWC to elaborate its verification and dispute-resolution provisions. Graham S. Pearson, *Strengthening the BTWC Regime: A Defense View*, Chemical Weapons Convention Bull 2 (Jun 1991); Jozef Goldblat and Thomas Bernauer, *Proposals for Strengthening the Biological Weapons Convention*, 22 *Bull Peace Proposals* 235 (1991).

⁸⁸ Efforts to implement the TTBT, to reduce the size of nuclear explosions it permits, or to negotiate a comprehensive test ban treaty have been plagued by controversy over hypothetical "evasion scenarios." Treaty opponents suggested that despite the proposed treaty, clandestine nuclear testing could still be accomplished inside enormous underground cavities, in the midst of an earthquake that muffles the seismic signals, or deep in outer space where the existing monitoring mechanisms might be inadequate. Treaty supporters were then compelled to develop language and technology to cover those imagined gaps in the verification arrangements. Koplow and Schrag, 26 *Stan J Intl L* at 236-38 (cited in note 38); 20 *Arms Control Today* at 4-5 (cited in note 39).

⁸⁹ See Soviet Noncompliance Report (cited in note 84) (detailing official allegations about Soviet violations of existing arms control treaties).

⁹⁰ Richard N. Perle, *What is Adequate Verification?*, in Gordon J. Humphrey, et al, eds, *SALT II and American Security* 53, 54-56 (Institute for Foreign Policy Analysis, 1980).

⁹¹ Edward L. Rowny, *Negotiating with the Soviets*, 18 *Atlantic Community Q* 300, 304 (1980); Whelan, Cong Res Service Rep No 83-141S at 82 (cited in note 55); Thomas W. Wolfe, *The SALT Experience* 9 (Ballinger, 1979).

C. The Difficulties of Treaty Detail

Only more recently has the converse case been developed, as national leaders belatedly recognize some of the inherent costs of the current detail-oriented strategy in treaty drafting. First, even the most gifted negotiators are patently unable to foresee everything that might become relevant in the treaty's lifespan. Many modern accords truly break new ground, writing substantive and procedural provisions that have no close precedents in the world of disarmament or elsewhere. The INF Treaty, for example, was the first to require destruction of an entire category of deployed nuclear arms, and the first to mandate on-site inspection of weapons facilities inside the U.S.S.R.⁹² The forthcoming chemical weapons convention will require even more invasive verification, injecting foreign personnel into the innermost operations of privately owned chemical, plastics, and fertilizer factories.⁹³ The START agreement will result in a permanent foreign official presence around the perimeter of major U.S. defense facilities to provide monitoring of incoming and outgoing cargos.⁹⁴ In all of this, there is precious little previous experience for negotiators to draw upon. Despite their efforts to be careful,⁹⁵ to experiment before making a commitment,⁹⁶ to simulate activities wherever possible,⁹⁷ and to think cre-

⁹² Blackwell, *On-Site Inspection in INF and START* at 95-106 (cited in note 41).

⁹³ Tanzman and Kellman, 22 *Intl L & Politics* 475 (cited in note 36).

⁹⁴ Blackwell, *On-Site Inspection in INF and START* at 106-19.

⁹⁵ Despite all the time and attention devoted to the preparation of the text of the INF Treaty, the parties discovered, shortly after signing it, that a number of technical mistakes, akin to typographical errors, had crept into the documents, especially in the Memorandum of Understanding establishing the treaty's database. Many of these errors were corrected via an exchange of diplomatic notes on May 21, 1988. *ACDA Treaty Book* at 445 (cited in note 5). See also R. Jeffrey Smith, *Rush Job on Nuclear Pact Produces Delaying Glitches*, *Wash Post A20* (Aug 16, 1991) (series of errors in newly-signed START agreement prevented its prompt release to public, allowing negotiators to correct mistakes).

⁹⁶ For example, before the United States and the Soviet Union concluded the 1990 protocols amplifying the verification provisions of the TTBT and PNET, they engaged in a sustained bilateral Joint Verification Experiment, to test the relative merits of seismic and hydrodynamic monitoring systems. Agreement on the Conduct of a Joint Verification Experiment, U.S.-U.S.S.R., May 31, 1988, 88 *Dept State Bull* (Aug 1988). Reportedly, the experiment "was very valuable" in the process of deriving suitable inspection equipment and procedures. 20 *Arms Control Today* at 5 (cited in note 39).

⁹⁷ In support of the ongoing negotiations toward a chemical weapons convention, several states have conducted "trial inspections" to explore the types of monitoring equipment and routines that would be necessary to detect violations of the treaty without unduly compromising industrial privacy. See S.J. Lundin, ed, *Non-Production by Industry of Chemical-Warfare Agents: Technical Verification under a Chemical Weapons Convention* (Oxford, 1988).

actively about the variations that may arise,⁹⁸ there will doubtless be glitches.

Second, the negotiators are aiming at a moving target, as the relevant technology advances with breathtaking speed. New weapons are designed and evaluated continuously, and sequential generations of arms are often deliberately made smaller, more mobile, and more difficult to track and identify.⁹⁹ No longer are fixed, land-based ICBM silos the critical issue in arms control; the cutting edge of verification continuously moves toward more elusive objectives.¹⁰⁰

At the same time, the technology of verification also advances rapidly.¹⁰¹ Mechanisms such as the "national technical means of verification"¹⁰² that sufficed to monitor compliance with SALT I and other agreements, are now often relegated to secondary importance in an era where on-site inspection and short-range electronic imaging devices are technically and legally feasible.¹⁰³ Future

⁹⁸ Arms control advocates have explored a variety of novel suggestions that could promote greater confidence in compliance with disarmament accords. See, for example, Jonathan B. Tucker, *Back to the Future: The Open Skies Talks*, 20 Arms Control Today 20 (Oct 1990) (describing the feasibility and desirability of an Open Skies agreement permitting aerial reconnaissance of other states' territories and military structures).

⁹⁹ Adelman, 87 Dept State Bull at 27 (cited in note 61).

¹⁰⁰ As the agenda of international disarmament efforts progresses toward controls on conventional forces (tanks, aircraft, troops, etc.), chemical weaponry, and other smaller, more portable items, the task of verifying compliance becomes more challenging and the corresponding treaty language often becomes more complex and detailed. Thomas J. Hirschfeld, *The Toughest Verification Challenge: Conventional Forces in Europe*, 19 Arms Control Today 16 (Mar 1989).

¹⁰¹ John A. Adam, *Ways to Verify the U.S.-Soviet Arms Pact*, 25 IEEE Spectrum 30, 31-34 (Feb 1988) (surveying the growth of technology in arms control verification).

¹⁰² In the SALT I negotiations, the United States and the Soviet Union coined the term "national technical means of verification" ("NTM") to refer to the array of photo-reconnaissance satellites, over-the-horizon radars, long-range seismometers, and the like that enabled them to keep tabs on each other from afar. These devices were sufficient to monitor the relatively large, conspicuous, immobile items limited by SALT I, obviating the need for on-site inspection. *Arms Control and National Security* at 142-43 (cited in note 83). Many agreements have adopted virtually identical language ensuring the parties' rights to use NTM, the obligation to refrain from actions that would interfere with the operation of NTM, and the obligation to refrain from "deliberate concealment measures" that impede the functioning of NTM. See ABM Treaty, Art XII (cited in note 1); SALT I Interim Agreement, Art V (cited in note 14); INF Treaty, Art XII (cited in note 28).

¹⁰³ The INF Treaty broke new ground in providing for frequent, in-depth inspection of previously-inaccessible military facilities inside the Soviet Union. The treaty permits American observers to visit some 130 sites (missile bases, assembly plants, etc.) over a period of thirteen years to verify the levels of the initial stockpiles, the progress on dismantling, and compliance with the ban on remanufacture. INF Treaty, Protocol on Inspections (cited in note 28); United States Arms Control and Disarmament Agency, *Understanding the INF Treaty* 1 (Office of Public Affairs, 1988).

breakthroughs may ease the verification burden in dazzling ways,¹⁰⁴ and new types of sensors may become available,¹⁰⁵ but current negotiators can hardly predict the next spin in remote sensing apparatus or non-invasive imaging equipment.

Perhaps most importantly, the politics of arms control continuously changes, too. The unpredictable ups and downs of *glasnost* and the dissolution of the Soviet Union have reverberated throughout international diplomacy as the uncertainties in internal Soviet, Commonwealth, and Russian politics generated inconsistencies in Moscow's approach to disarmament negotiations.¹⁰⁶ At some points it has appeared that the world was poised on the brink of truly staggering advances in arms control;¹⁰⁷ at other times, the old rigidity has reappeared and progress has ground to a halt.¹⁰⁸ For negotiators attempting to fashion a treaty regime that will endure for many years—some treaties have fixed terms, but most are of unlimited duration¹⁰⁹—the political uncertainty complicates every-

¹⁰⁴ 1985 Arms Control Rptr 611.B.246 (Jul 26) (describing laboratory work on device to count warheads on a missile without opening it); Russell Maxfield and Arend J. Meerburg, *Two Techniques for Verifying Conventional Reductions*, 19 Arms Control Today 18, 20-21 (Aug 1989) (describing development of unique "tags" that could be permanently affixed to weaponry, allowing inspectors reliably to count permitted numbers); H.O. Newsham, *Detecting Underground Nuclear Explosions Using Neutrinos*, 11 Arms Control, No 3, 232 (1990) (proposing a new, remote method for supplementing the traditional seismic systems in verifying compliance with nuclear test ban treaties).

¹⁰⁵ The Open Skies Treaty, for example, contemplates additions to the list of sensors that could be used on overflights, as the cost of the sensors declines and as their political acceptability increases. Open Skies Treaty, Arts IV, § 3; X, § 5 (on file with U Chi L Rev).

¹⁰⁶ David Hoffman, *U.S. Officials See Signs of Cooperation by Soviets*, Wash Post A42 (May 23, 1991) (linking erratic Soviet behavior on arms issues to the continuing tumult in internal Soviet economic and political life); Rhinelander and Bunn, 21 Arms Control Today at 3 (cited in note 3) (discussing succession problems provoked by dissolution of the U.S.S.R.).

¹⁰⁷ At their 1986 summit meeting in Reykjavik, Iceland, for example, Reagan and Gorbachev reportedly reached a contingent agreement to eliminate all their nuclear ballistic missiles within ten years. However, no such treaty was negotiated. Lou Cannon, *Reagan-Gorbachev Summit Talks Collapse as Deadlock on SDI Wipes Out Other Gains*, Wash Post A1 (Oct 13, 1986).

¹⁰⁸ See David Hoffman, *U.S., Soviets Again Fail to Settle Treaty Dispute*, Wash Post A6 (May 22, 1991) (describing obstructionist efforts by Soviet military officials to exclude four naval infantry units from the coverage of the CFE Treaty); *Gist: Open Skies Treaty*, 3 U.S. Department of State Dispatch, No 13, 258 (on file with U Chi L Rev) (political turmoil inside U.S.S.R. delayed conclusion of Open Skies Treaty).

¹⁰⁹ The Interim Agreement had a term of five years. *Id.*, Art VIII, § 2 (cited in note 14). Treaties of unlimited or renewable duration include: the BWC, Art XIII, § 1 (cited in note 12); the ABM Treaty, Art XV, § 1 (cited in note 1); the TTBT, Art V, § 1 (cited in note 16); the INF Treaty, Art XV (cited in note 28); the START Agreement, Art XVII, § 2 (cited in note 40); and the Open Skies Treaty, Art XV, § 1 (cited in note 105). The NPT has an initial term of twenty-five years and there has been uncertainty about procedures for continuing it beyond that period. *Id.*, Art X, § 2 (cited in note 10). See Thomas Graham, Jr., *The*

thing. Without some confidence about the future political milieu, it is difficult to craft verification measures that are sufficiently precise and not procrustean.¹¹⁰

The political ambiguity is exacerbated when the arms control negotiations become multilateral.¹¹¹ Dealings between the two superpowers have been complicated enough; the process threatens to bog down entirely when the interests of forty or more other states—each with its own aspirations, fears, weapons stockpiles and verification sensitivities—are included.¹¹² Rapid changes of government, or even of entire systems of government,¹¹³ make it difficult to design a verification system that can withstand diverse challenges in the long run. Moreover, changing a multilateral treaty regime once sufficient countries have adhered in order to bring it into force, can be a massive undertaking, involving fresh

Duration of the Nuclear Non-Proliferation Treaty: Sudden Death or New Lease on Life?, 29 Va J Intl L 661 (1989) (describing options for 1995 Review Conference).

¹¹⁰ No plausible treaty regime could provide 100% certainty of compliance; there will always be some room for error and some danger that a determined state could frustrate even the most exacting inspection provisions. On the other hand, carefully crafted treaty terms can deter violations and substantially increase the parties' confidence in reciprocal compliance. Krepon and Graybeal, *Future Treaty Implementation* at 239 (cited in note 71); Eimer and Lacey, *Signal* 29 (cited in note 84).

¹¹¹ Among the disarmament agreements discussed in this Article, the Geneva Protocol (cited in note 5); the Antarctic Treaty (cited in note 7); the LTBT (cited in note 9); the NPT (cited in note 10); the Outer Space Treaty (cited in note 12); the Seabeds Arms Control Treaty (cited in note 12); the BWC (cited in note 12); the Treaty of Tlatelolco (cited in note 12); the CFE Treaty (cited in note 32); the Open Skies Treaty (cited in note 105); and the future Chemical Weapons Convention (cited in note 35) are all multilateral agreements.

The ABM Treaty (cited in note 1); the SALT I Interim Agreement (cited in note 14); the SALT II Treaty (cited in note 25); the INF Treaty (cited in note 28); the 1990 Chemical Weapons agreement (cited in note 36); and the START Agreement (cited in note 40) have been bilateral between the United States and the Soviet Union.

¹¹² In the 1977-80 negotiations toward a comprehensive nuclear test ban treaty, the three participating states (the United States, the Soviet Union, and the United Kingdom) were developing a two-tiered structure, in which some parts of the treaty (the basic prohibition on nuclear tests, as well as some rudimentary multilateral verification mechanisms) would be open for signature by all states, while other parts (including the most detailed and intrusive verification arrangements) would be operable only among the three negotiating states. Herbert F. York, *Making Weapons, Talking Peace: A Physicist's Odyssey from Hiroshima to Geneva* 301 (Basic, 1987).

¹¹³ The dissolution of the Warsaw Pact, for example, significantly altered the dynamics of multilateral arms control negotiations regarding conventional forces in Europe. The former "satellite" states of Eastern Europe emerged as full participants in the disarmament process, often pursuing their own agendas independently of Moscow. Thomas Graham, Jr., *The CFE Story: Tales from the Negotiating Table*, 21 Arms Control Today 9, 10-11 (Jan/Feb 1991).

ratification efforts or other time-consuming domestic processes in many countries.¹¹⁴

Finally, there is often a significant problem in the internal dynamics shaping a country's domestic negotiations process. That is, when the international bargaining does progress far enough to raise a new question about some previously unaddressed detail of a prospective arms control treaty, the American bureaucracy is forced to respond, with each affected Washington, D.C. agency developing its own tentative position and with the leadership hammering out inter-agency consensus on new instructions to the delegation.¹¹⁵ That Byzantine clearance process consumes time and political capital, often generating intense internal and international discord.¹¹⁶ If more issues could be ignored or finessed, or if they could be deferred for later resolution outside the glare of public scrutiny, many potential controversies might remain amicably latent and the bargaining process would be appreciably easier and faster. But under current conditions, the agenda of issues to be resolved is massive, and each item receives a thorough work-up.

D. Alternative Strategies

In this situation—pressed for details, yet unable to foresee a perfect solution—arms control negotiators have attempted a variety of procedural ploys. Three maneuvers are especially noteworthy.

The first approach is simply to take the onrushing bull by the horns and accept the obligation to negotiate treaties of massive detail. In SALT II, for example, the negotiators wrapped into one package substantive agreements on long-range ballistic missiles, bombers and cruise missiles, and spun out a verification grid that covered each of the systems. This process consumed almost seven years of talks.¹¹⁷ In the INF Treaty, the United States and the So-

¹¹⁴ Goldblat and Bernauer, 22 Bull Peace Proposals at 239 (cited in note 87) (attempting to amend the BWC could lead to an unraveling of the treaty text).

¹¹⁵ McNeill, 79 Am J Intl L at 61-62 (cited in note 27); Lincoln P. Bloomfield, *The National Security Process*, in John N. Moore, Frederick S. Tipson, and Robert F. Turner, eds, *National Security Law* 893 (Carolina Academic, 1990); Einhorn, 32 Survival 497 (cited in note 70).

¹¹⁶ York, *Making Weapons, Talking Peace* at 282-323 (cited in note 112); Krepon and Graybeal, *Dealing with Future Treaty Implementation* (cited in note 71); Phillip R. Trimble, *Arms Control and International Negotiation Theory*, 25 Stan J Intl L 543, 553-58 (1989).

¹¹⁷ The SALT II negotiations were in session from November 1972 through June 1979. *ACDA Treaty Book* at 261-63 (cited in note 5).

viet Union first groped toward an agreement limited to medium-range missiles. But when it appeared that the retention of their shorter-range systems could pose a troubling danger of circumvention, the parties stayed at the bargaining table until they were able to fashion an agreement to reduce that category of weapons to zero, too.¹¹⁸ In the negotiations over chemical weapons, it has likewise appeared possible that the delegations might be able relatively quickly to reach a partial or temporary agreement dealing with at least a part of the overall problem. But the participants—perhaps fearing that interim measures would be critiqued as insufficient—have elected to pursue a single, massive document that resolves all the outstanding issues simultaneously.¹¹⁹

If that first approach means that the executive branch, saving up the pieces for a comprehensive solution, does not go to the Senate very often with an arms control agreement, a second approach suggests that the President might not go to the Senate at all, when dealing with an accord that is merely partial or temporary. That is, on occasion the executive has avoided treaty formalities altogether, by making policy through a non-binding “political agreement”¹²⁰ or through the exchange of unilateral-but-parallel “statements of intention” that are revocable and create no legal commitment, but nonetheless guide expectations and generate reciprocal behaviors.¹²¹ The SALT I Interim Agreement, for example, was “extended” far beyond its original five year duration via the exchange

¹¹⁸ Id at 347-48; Rhinelander, *Arms Control in the Nuclear Age* at 625-28 (cited in note 46).

¹¹⁹ Julian Perry Robinson, *Chemical and Biological Warfare Developments: 1985 45-52* (Oxford, 1986) (detailing proposals for a relatively limited treaty to ban the spread of chemical weaponry).

¹²⁰ See, for example, the “Helsinki process,” through which the United States and the other participants in the Conference on Confidence- and Security-Building Measures and Disarmament in Europe have been able to develop sets of agreed measures to enhance the “transparency” of military establishments on the continent, reducing the potential for, and the fears about, surprise attack. *ACDA Treaty Book* at 319-35 (cited in note 5). These important documents are described as being “politically binding.” They are not treaties containing legal obligations, but they have already played an important role in easing international tensions. Id at 319. See also Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 Am J Intl L 296 (1977) (discussing legal import of political accords).

¹²¹ Restatement at § 301, Reporters’ Note 2 (cited in note 47) (describing non-binding agreements); Franck and Glennon, *Foreign Relations and National Security Law* at 412-18 (cited in note 64). See also 22 CFR § 181.2 at 562 (1991) (differentiating true international agreements from accords that are *de minimis* or only politically binding and therefore need not be reported to Congress under the Case-Zablocki Act, 1 USC § 112(b)).

of executive statements.¹²² The SALT II Treaty was honored for seven years, even without ratification, based simply on the parties' mutual expression of intentions not to "undercut" it while they decided what to do next.¹²³ The Congress held hearings relevant to these declarations and debated their implications, but never recorded a formal vote.

More recently, President Bush's dramatic September 1991 disarmament initiatives (dismantling short-range nuclear missiles, withdrawing nuclear arms from surface naval vessels, etc.) were initially cast as unilateral American acts, but there was a clear intention to elicit reciprocal Soviet cuts. That response did, in fact, occur, but the package was not framed as an explicit "agreement," so Congress was never brought into the exchange.¹²⁴ Since then, this informal process has accelerated, with additional weapons reductions being secured, all without any written, ratified documents.¹²⁵

These types of informal understandings have also been influential in multilateral arms control. For example, their appeal and success have been evidenced by the United States' ongoing participation in the "Australia Group" of developed countries that seek voluntarily to coordinate their export controls regarding chemical weapons-related goods and technology,¹²⁶ even without a treaty. Similar informal arrangements obtain among cognate organizations that pursue nuclear non-proliferation and other objectives through non-treaty alignment of national policies.¹²⁷

¹²² Note, 21 Va J Intl L at 756 (cited in note 67); Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 Am J Intl L 257, 267 (1983) (discussing and reprinting United States and Soviet coordinated statements prolonging their adherence to Interim Agreement).

¹²³ ACDA Treaty Book at 263 (cited in note 5).

¹²⁴ *Arms Control: U.S. and Soviet Announcements and Proposals of Major Reductions in Nuclear Weapons*, 2 Foreign Pol Bull 47 (Sep/Oct 1991); Andrew Rosenthal, *U.S. to Give Up Short-Range Nuclear Arms; Bush Seeks Soviet Cuts and Further Talks*, NY Times A1 (Sep 28, 1991).

¹²⁵ David Hoffman, *U.S., Russia Seek to Create Missile Warning Site*, Wash Post A24 (Feb 19, 1992); Ken Adelman, *Taking a Short Cut*, Wash Times F1 (Feb 5, 1992).

¹²⁶ Lois R. Ember, *Worldwide Spread of Chemical Arms Receiving Increased Attention*, Chemical & Engineering News 8 (Apr 14, 1986).

¹²⁷ See Jozef Goldblat, *Nuclear Non-Proliferation: A Balance Sheet of Conflicting Trends*, 20 Bull Peace Proposals 369, 374 (1989) (states that supply nuclear fuel, technology and equipment have attempted to coordinate their export policies through the "London Suppliers Group" and the "Zangger Committee"); Bruce Stokes, *Monitoring U.S. Exports: Why Bother?*, Natl J 2487 (Oct 12, 1991); Stuart Auerbach, *High-Tech Export Curbs to Be Reexamined*, Wash Post F1 (Oct 11, 1991) (United States and allies are now engaged in modifying the rules of the Coordinating Committee for Multilateral Export Controls (CoCom), established in 1949 to curtail the flow of military-related technology to the Soviet

In the same vein, traditional international law obligates parties to refrain from actions that would "defeat the object and purpose" of a treaty in the interval between signature and ratification.¹²⁸ In some instances—notably, the TTBT and PNET—that hiatus has been extended.¹²⁹ This process, too, creates and sustains arms control limitations through unilateral presidential action, with no congressional participation.¹³⁰

Overall, this informal avenue offers appreciable benefits in flexibility (the parties can experiment with a partial regime on a topic, even if they cannot yet agree on all aspects of the problem), immediacy (the President need not wait for the Congress to approve an international bargain), and revocability (the policies are subject to reversal at any time, without any legal recourse by the other side). However, the practice also carries the simultaneous dangers of imprecision (exactly what have the parties, in their various statements, undertaken to do?)¹³¹ and unreliability (since the policies are revocable unilaterally, they hardly constitute a durable basis for international relations).¹³²

Finally, several modern arms control agreements have attempted to deal with the emerging problem of creeping obsolescence through a third mechanism, the creation of new legal institutions. These have generally taken the form of permanent international commissions or consultative organizations, author-

Union); *U.N.'s Big Five Agree on Arms-Export Rules*, Wash Times A6 (Oct 19, 1991) (informal international accord on controlling conventional arms sales).

¹²⁸ Vienna Convention on the Law of Treaties, Art 18 (May 23, 1969), S Ex Rep 92-L, 92d Cong, 1st Sess (1970) (in force, US not a party) ("Vienna Convention"); Restatement at § 312, comment i (cited in note 47). The Vienna Convention is not in force for the United States, but the State Department has determined that most portions of it are binding anyway, as an expression of customary international law. Restatement at 144-45 (introductory note). See also Note, 21 Va J Intl L 747 (cited in note 67); Glennon, 77 Am J Intl L at 272-78 (cited in note 122) (analyzing the constitutionality of the Vienna Convention's Article 18 in imposing legal restraints upon the United States prior to Senate consent to the treaty).

¹²⁹ The TTBT (cited in note 16) was signed in 1974 and the PNET (cited in note 17) was signed in 1976. They entered into force in 1990, after the negotiation of the additional verification protocols. 1990 Arms Control Rptr 605.B.114 (Dec 10).

¹³⁰ Glennon, 77 Am J Intl L at 272-78 (cited in note 122).

¹³¹ Franck and Glennon, *Foreign Relations and National Security Law* at 412-18 (cited in note 64).

¹³² Some would argue, however, that informal, unwritten arms control agreements are just as reliable—or just as unreliable—as official treaties, because in neither case does international law provide a comprehensive, satisfactory mechanism for resolving controversies or enforcing compliance. Phillip R. Trimble, *Beyond Verification: The Next Step in Arms Control*, 102 Harv L Rev 885, 889-91 (1989). See also *Nuclear Tests Cases: Australia v. France and New Zealand v. France*, 1973 ICJ Reports 99, 135; 1974 ICJ Reports 253, 457 (unilateral declaration of policy by French government held to be a binding commitment).

ized, in varying terms, to consider controversies that might arise under the treaty, to develop necessary implementation measures, and to examine other avenues for enhancing the treaty's ability to serve the parties' disarmament interests.¹³³ The SALT Standing Consultative Commission (SCC)¹³⁴ was the initial prototype for this vehicle,¹³⁵ and others have proliferated: the INF Treaty elicited a Special Verification Commission (SVC),¹³⁶ the PNET creates a Joint Consultative Commission,¹³⁷ the 1990 TTBT Protocol has a Bilateral Consultative Commission,¹³⁸ the CFE Treaty authorizes a Joint Consultative Group,¹³⁹ the START agreement establishes a Joint Compliance and Inspection Commission,¹⁴⁰ the Open Skies Treaty creates an Open Skies Consultative Commission,¹⁴¹ and the future Chemical Weapons Convention will bring forth a multilateral organization for the prohibition of chemical weapons.¹⁴²

Political controversy has long raged inside the United States regarding the efficacy of the SCC as a dispute resolution mechanism,¹⁴³ but there is no doubt about its success in developing agreements (typically cast as executive agreements, rather than as treaties, and often classified secret) to implement the SALT I pro-

¹³³ Despite their titles, these bodies are not impartial, independent judicial or arbitral tribunals endowed with the power to issue their own orders to the parties as, say, the International Court of Justice might. Instead, the arms control groups are more properly thought of as fora for ongoing negotiations between the participating countries, where the United States and the Soviet Union each have been represented by their diplomatic agents, and where they strive to develop areas of consensus.

¹³⁴ The SCC was established pursuant to the ABM Treaty, Art XIII (cited in note 1). The Interim Agreement, Art VI (cited in note 14), and the SALT II Treaty, Art XVII (cited in note 25), also referred selected issues to the SCC.

¹³⁵ See R. Jeffrey Smith, *Arms Agreement Breathes New Life into SCC*, 229 Science 535 (Aug 9, 1985); Sidney N. Graybeal and Michael Krepon, *SCC: Neglected Arms Control Tool*, 41 Bull Atomic Scientists 30 (Nov 1985) (describing the purposes and operations of the SCC).

¹³⁶ INF Treaty, Art XIII (cited in note 28).

¹³⁷ PNET, Art V (cited in note 17).

¹³⁸ 1990 TTBT Protocol, § XI (cited in note 37).

¹³⁹ CFE Treaty, Art XVI (cited in note 32).

¹⁴⁰ START Agreement, Art XV and Protocol on the Joint Compliance and Inspection Commission (cited in note 40).

¹⁴¹ Open Skies Treaty, Art X and Annex L (cited in note 105). As with most of the other implementation bodies, the proceedings of the Open Skies Commission are designed to be confidential, unless otherwise agreed. *Id.* at Annex L, § I.8.

¹⁴² CW Convention, Art VIII (cited in note 35).

¹⁴³ The Reagan Administration criticized the SCC as a tribunal that merely covered up, instead of confronting or resolving, Soviet violations of disarmament accords, but other expert observers have concluded that the SCC was effective in settling compliance controversies and in negotiating implementing agreements to promote disarmament. Graybeal and Krepon, 41 Bull Atomic Scientists 30 (cited in note 135).

visions.¹⁴⁴ The operation of some of the other bodies is discussed in the next Section of the Article.

II. THE ADMINISTRATION'S CURRENT STRATEGY

In the effort to deal with the emerging problems noted in Section I, the executive branch has recently devised a new strategy. Under this approach, the freshly negotiated arms control agreement, laden as it is with details, also includes a provision stating that some of the terms are subject to future change through negotiations between the parties, and affirming that these changes are not to be considered "amendments to the treaty." In this way, it is argued, the necessary alterations may be implemented via a subsequent executive agreement, a simple exchange of notes, or other diplomatic means. The executive branch will informally consult Congress *after* the modifications are agreed upon, but the legislature has no voice and no opportunity to vote. Five recent treaties provide case studies, and there is the real prospect of more to come.

A. The INF Treaty

The non-amendment procedure was first developed late in the INF Treaty negotiating process,¹⁴⁵ and the various INF Treaty documents incorporated three provisions designed to ease the process of implementing subsequent modifications to its negotiated terms. First, the Inspections Protocol, governing the rights and functions of the personnel responsible for on-site monitoring, provides that in the SVC¹⁴⁶ the parties "may agree upon such measures as may be necessary to improve the viability and effectiveness of this Protocol. Such measures shall not be deemed amendments to the Treaty."¹⁴⁷ Second, the Elimination Protocol,

¹⁴⁴ Most of the products of the SCC are not available to the public, but discussions have revealed the existence of a few, such as two 1974 protocols on procedures for the destruction or dismantling of offensive and defensive systems pursuant to the ABM Treaty and the Interim Agreement. Graybeal and Krepon, 41 Bull Atomic Scientists at 31-32 (cited in note 135).

¹⁴⁵ Interview with Karen Look, Chief, Theater Affairs Division, United States Arms Control and Disarmament Agency (Nov 25, 1991) ("Look Interview"); American Society of International Law, Proceedings of the 84th Annual Meeting 411 (Mar 28-31, 1990) (remarks by George Look) ("1990 ASIL Proceedings").

¹⁴⁶ The treaty charges the SVC with responsibility, *inter alia*, for developing agreement "upon such measures as may be necessary to improve the viability and effectiveness of this Treaty." INF Treaty, Art XIII, § 1(b) (cited in note 28).

¹⁴⁷ *Id.*, Inspections Protocol, Art XI, § 4.

which prescribes the methods for disposing of excess weapons, contains an identical provision.¹⁴⁸ Finally, the Elimination Protocol also provides, just prior to its lengthy and exacting listing of the specific steps necessary to demolish, crush, burn, or otherwise destroy each type of banned equipment, that its specifications shall be followed, "unless the Parties agree upon different procedures to achieve the same result."¹⁴⁹

The twin "viability and effectiveness" provisions of the two protocols attracted senatorial attention during the INF Treaty ratification debate. The Secretary of State's formal article-by-article analysis, submitting the treaty to the Senate, had stated that "while substantive obligations cannot be changed absent an agreed amendment to the Treaty, minor matters relating to the detailed elimination procedures may be altered through agreement of the Parties in order to facilitate the implementation of the Treaty regime."¹⁵⁰

During hearings before the Armed Services Committee, Senator Nunn inquired whether the viability and effectiveness changes would be "subject to ratification in accordance with the constitutional procedures of each party."¹⁵¹ Testifying on behalf of the administration, Michael Matheson, Deputy Legal Adviser to the Department of State, responded:

there are procedures in each of the protocols for changes in technical details. These provisions were designed to make possible rapid technical amendment so that the treaty could keep up with the real life situation. This procedure for rapid technical changes would not require advice and consent of the Senate.¹⁵²

Ambassador Maynard Glitman, the chief negotiator of the treaty, then added:

I think it will depend on the situation. But what we had in mind here was essentially if it requires a change in the obliga-

¹⁴⁸ *Id.*, Elimination Protocol, Art V, § 2.

¹⁴⁹ *Id.*, Elimination Protocol, Art II, § 10.

¹⁵⁰ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Message from the President, Treaty Doc 100-11, 100th Cong, 2d Sess 43 (Jan 25, 1988). Identical language explaining the viability and effectiveness provisions of the Inspections Protocol appears in *id.* at 58-59.

¹⁵¹ NATO Defense and the INF Treaty, Hearings and Meetings before the Senate Committee on Armed Services, S Hrg 100-493, 100th Cong, 2d Sess, Part 4 at 410 (1988).

¹⁵² *Id.*

tions, then it requires an amendment obviously subject to ratification procedures. If it is a technical change, if we find a new kind of measuring device, if we decide to use some kind of new technology that comes up which will be helpful to the inspectors, which we had not foreseen, we do not necessarily want to bother the Senate with whether we can come up with a different kind of a scale, for example, or weighing device or something like that.¹⁵³

Later, Senator Wirth (D-Colo) pressed the same point, seeking a more clearly defined line between the types of technical changes that could be implemented by the executive alone and the substantive changes that would require Senate participation.¹⁵⁴ Glitman again suggested that the "technical" changes were modifications like the substitution of a new type of weighing device or a new satellite communications system for those originally contemplated in the treaty.¹⁵⁵ Glitman then identified the political reality that would as a practical matter guide the executive in future characterizations:

We are going to have to work with the Senate, with the Congress to ensure in the future that if there are changes, Congress will know that they are on their way and that they are either technical or a major obligation change. It is up to us, and not to us and the Soviets how we carry out our constitutional procedures or how they do theirs. All you have to do is to assure that it is legally done in your country.¹⁵⁶

There were also references to the executive's obligation to provide to the Congress the full text of any subsequent agreements, even technical ones not requiring advice and consent. Matheson and Glitman confirmed that the Case-Zablocki Act would be applicable in all instances.¹⁵⁷

As a result of these exchanges, the Armed Services Committee Report recommended that no additional understanding or other

¹⁵³ Id at 411.

¹⁵⁴ Id at 461.

¹⁵⁵ Id at 460. He asserted, "That is the sort of thing that the Senate would not want to go through a whole ratification process on." Id.

¹⁵⁶ Id at 461. In response to further questions from Senator John Warner (R-Va), Glitman also confirmed that agreements reached in the SVC could not be used "to give the treaty a meaning that is contrary to or inconsistent with the meaning of the treaty as presented to the Senate" and that the informal process for modifying the protocols could not be utilized to alter any provisions contained in the basic treaty. Id at 462.

¹⁵⁷ Id at 412, 460.

statement regarding possible future changes in the documents needed to be inserted into the INF Treaty resolution of ratification.¹⁵⁸ The Senate Foreign Relations Committee touched upon the issue more briefly,¹⁵⁹ reaching similar conclusions (over the objection of Senator Helms, who argued that the loose provisions on treaty modification would undercut the Senate's special prerogatives in the treaty process).¹⁶⁰

There has already been a substantial body of experience in the exercise of these modification provisions of the INF Treaty, and six different documents have so far been negotiated and implemented under that authority. First, within the initial year of the treaty's life, the United States and the Soviet Union produced three relatively minor sets of accords, to establish the operating procedures for the SVC,¹⁶¹ to outline the "portal perimeter" inspections at the Soviet missile facility at Votkinsk,¹⁶² and to create a similar verification regime outside the comparable American facility at Magna, Utah.¹⁶³ In each case, the documents provided additional details, supplementing those already specified in the treaty, rather than altering any of those original provisions.

Each of these three accords was then forwarded to Congress. (The Arms Control and Disarmament Agency provided timely notification, together with some explanatory details and a recounting of the negotiating history, pursuant to the Case-Zablocki Act, to

¹⁵⁸ NATO Defense and the INF Treaty, Report of the Senate Committee on Armed Services, S Rep No 100-312, 100th Cong, 2d Sess 25-26 (Apr 1988).

¹⁵⁹ The INF Treaty, Hearings before the Senate Committee on Foreign Relations, S Hrg 100-522, 100th Cong, 2d Sess, Part 5 at 685 (Mar 1988) (executive branch responses to questions posed by Senator Helms). The State Department advised the Committee that "[a]ny changes which substantively affect U.S. obligations under the Treaty will be submitted to the Senate for its advice and consent." *Id.*

¹⁶⁰ The INF Treaty, Report of the Senate Committee on Foreign Relations, S Exec Rep No 100-15, 100th Cong, 2d Sess 253-54 (Apr 14, 1988) (separate views of Senator Helms).

¹⁶¹ Memorandum of Understanding Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding Procedures for the Operation of the Special Verification Commission (Dec 20, 1988) (on file with U Chi L Rev). This agreement implemented the parties' decision to create the SVC within the structure outlined in Article XIII of the INF Treaty. It was effective immediately upon signature.

¹⁶² Special Verification Commission, Agreed Statement (Dec 8, 1988) (concerning monitoring procedures at Votkinsk) (on file with U Chi L Rev). The INF Treaty established a system of verification inspections to occur at the entrances and exits of selected missile-related facilities inside the United States and U.S.S.R., to ensure that cargoes leaving the plant did not contain prohibited missiles. INF Treaty, Art XI, § 6 (cited in note 28).

¹⁶³ Special Verification Commission, Agreed Statement (Jun 9, 1989) (on file with U Chi L Rev) (concerning monitoring procedures at Magna, Utah). Each of the Agreed Statements specified that it "shall be binding," and that it was effective upon signature. Agreed Statement of Dec 8, 1988 at ¶¶ 2, 3; Agreed Statement of Jun 9, 1989 at ¶¶ 2, 3.

the three relevant committees in each house.)¹⁶⁴ The executive branch also offered to brief members of Congress or their staffs on the details of the accords. But no one from the legislature accepted the invitation, and there were no public hearings or other record.¹⁶⁵

On December 21, 1989, however, the United States and the Soviet Union signed a more important Memorandum of Agreement (MOA), containing the basic implementation measures of the INF Treaty.¹⁶⁶ The result of eighteen months of bargaining, the MOA and its annexes ran to 137 pages. Some provisions of it were plainly designed to fill conspicuous gaps intentionally deferred in the INF Treaty. For example, the treaty had authorized each party to utilize some form of "non-damaging image producing equipment" to inspect the contents of large cargos exiting specified missile production facilities.¹⁶⁷ The MOA, in turn, specified that the United States would install and operate the "Cargoscan" imaging x-ray system at the portals of the Votkinsk missile manufacturing facility inside the U.S.S.R. as the mechanism for effectuating that treaty provision.¹⁶⁸ Similarly, other MOA provisions reflect the

¹⁶⁴ Interview with Thomas Graham, Jr., General Counsel, United States Arms Control and Disarmament Agency (Nov 4, 1991) ("Graham Interview").

¹⁶⁵ Interview with David Abramowitz, Attorney-Adviser, United States Department of State, Office of the Legal Adviser (Sep 6, 1991) ("Abramowitz Interview").

¹⁶⁶ Memorandum of Agreement Regarding the Implementation of the Verification Provisions of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-range and Shorter-range Missiles (Dec 21, 1989) ("MOA") (on file with U Chi L Rev). See American Society of International Law, Proceedings of the 84th Annual Meeting at 411 (cited in note 145) (remarks by George Look). Certain procedures of the draft MOA were applied provisionally between the parties, as a practical device for initiating the verification arrangements, even before the entire document was negotiated and signed. Interview with Steven E. Steiner, Representative of the United States to the Special Verification Commission (Sep 16, 1991) ("Steiner Interview"). See text accompanying notes 243-46.

¹⁶⁷ INF Treaty, Protocol on Inspections, Art IX, § 6(d) (cited in note 28). The portal/perimeter monitoring system had to be designed to ensure that items leaving the manufacturing facility did not include prohibited missiles, while still preserving any military or commercial secrets about what the contents actually were.

¹⁶⁸ MOA, Annex V (cited in note 166). Cargoscan is a novel x-ray system that permits inspectors to measure the size of a missile (and thereby determine its type) without opening the missile's canister and visually examining it. When the United States first attempted to operate the system, pursuant to the MOA, the Soviet Union objected, contending that the area x-rayed was several centimeters larger than the agreement had specified and that the United States was storing the x-ray images on tape, perhaps permitting subsequent electronic enhancement. Minor adjustments were then made. Cathie M. Lorenz, *Controversies Mar Soviet INF Compliance*, 20 Arms Control Today 29 (Apr 1990). The MOA provides elaborate details about the permitted Cargoscan equipment and its operation, and specifies that the future substitution of similar equipment shall not be deemed to be an amendment to the MOA. MOA, Annex V, § I.A (cited in note 166).

parties' understandings about additional details of the verification network.¹⁶⁹

Other sections of the MOA, however, contained actual departures from the original text of the Protocols on Inspections and Elimination.¹⁷⁰ Specifically citing the "viability and effectiveness" language, these modifications involved terms such as substituting new types of inspection aircraft for those specified in the treaty,¹⁷¹ altering the titles and structure of the inspecting team,¹⁷² and real-locating the costs of the telephone lines installed at the permanent inspection installations.¹⁷³ In addition, the MOA also invoked the INF Treaty's other provision allowing changes in the elimination procedures¹⁷⁴ to specify altered procedures for cutting or exploding certain missile equipment.¹⁷⁵

Again, the post-signature implementation of the agreement amounted to informing Congress, but not seeking its approval. The executive branch provided the MOA documents to the relevant committees, together with explanatory details, and offered informational briefings as well.¹⁷⁶ This time, the higher visibility of several of the issues prompted somewhat greater legislative curiosity. Senior congressional staff requested and received several briefing sessions, although no members of Congress attended. In these briefings, government officials elaborated the details of the accords and their projected operations. But as before, Congress convened no hearings and recorded no votes.¹⁷⁷

In addition, two further modifications in INF Treaty implementation procedures—stylized as sequentially numbered amend-

¹⁶⁹ For example, the MOA clarifies the timing and mechanisms for conducting the data exchanges and notifications required by the treaty. MOA, Art I (cited in note 166). It also partially implements the portion of the treaty that permits the inspectors to bring "other equipment, as agreed by the Parties." *Id.*, Art III, § D.1.

¹⁷⁰ The opening phrase of the MOA cites the "viability and effectiveness" language of the treaty as a general validation of the entire package of agreements. MOA, Preamble (cited in note 166). The drafters of the MOA then deliberately used varying vocabulary to denote the different legal authority for selected provisions. That is, "the parties understand" was used in places where the MOA merely *interprets* the prior provisions; "the parties agree" was used for gap-filling *additions* to the original accords; and the "viability and effectiveness" language was used for *changes*. Look Interview (cited in note 145).

¹⁷¹ MOA, Art III, § A.8 (cited in note 166).

¹⁷² *Id.*, Art III, § D.7.

¹⁷³ *Id.*, Art III, § G.2.

¹⁷⁴ INF Treaty, Elimination Protocol, Art II (cited in note 28).

¹⁷⁵ MOA, Art II.

¹⁷⁶ Graham Interview (cited in note 164).

¹⁷⁷ Abramowitz Interview (cited in note 165); Steiner Interview (cited in note 166).

ments to the MOA, rather than as free-standing agreements¹⁷⁸—were negotiated in April, 1991.¹⁷⁹ These, too, provide details on selected aspects of the verification arrangements, specifying the system for measuring the size of the SS-25 missile,¹⁸⁰ and permitting inspection personnel to carry personal safety devices (“dosimeters”) during the performance of their duties.¹⁸¹ These two amendments were effectuated in a similar fashion,¹⁸² and once again, the legislature did not respond to the executive’s offer to provide informational briefings.¹⁸³

Other similar amendments to the MOA are also being prepared, and the procedures could shortly be invoked again to create instruments that would further modify the treaty regime regarding changes in the flight routes that arriving inspectors could use, and allocating the financial costs of the inspections.¹⁸⁴

B. The TTBT/PNET

The second noteworthy occasion where the executive branch proposed an expedited procedure for treaty modification came in

¹⁷⁸ MOA, Art IV, § 3 (cited in note 166).

¹⁷⁹ Amendment I to the Memorandum of Agreement Regarding the Implementation of the Verification Provisions of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-range and Shorter-range Missiles (System for Measuring the Length and Diameter of the Second Stage of the SS-25 Missile) (Apr 4, 1991) (on file with U Chi L Rev); Amendment II to the Memorandum of Agreement Regarding the Implementation of the Verification Provisions of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-range and Shorter-range Missiles (Personal Dosimeters for Inspectors) (Apr 4, 1991) (on file with U Chi L Rev).

¹⁸⁰ This amendment specified the equipment and procedures that would be used by the United States to measure the length and diameter of the second stage of the Soviet SS-25 missile as it leaves the Votkinsk production facility. Details of the operation and storage of the measuring equipment did effectuate certain departures from the original provisions of the INF Treaty, so the power to make “viability and effectiveness” changes was explicitly invoked. Amendment I, Art I, §§ 27, 28 (cited in note 179).

¹⁸¹ Dosimeters are used by an inspector for personal health monitoring. The MOA had not specifically permitted them (and the accompanying charger units), so this amendment supplements, rather than alters, the original terms.

The amendment also allows each party to change the type of dosimeter and charging unit that it will use on future inspections, and provides that such substitution will not be deemed an amendment to the amendment. Amendment II, Art I, § 14 (cited in note 179).

¹⁸² See United States Government, Analysis of Amendments I and II to the Memorandum of Agreement Regarding the Implementation of the Verification Provisions of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-range and Shorter-range Missiles (on file with U Chi L Rev).

¹⁸³ Steiner Interview (cited in note 166).

¹⁸⁴ *Id.*

the 1990 Protocols to the TTBT and PNET. There the negotiators specified with punctilious care all the procedures and standards that would govern the verification practices, but they also authorized the Bilateral Consultative Commission ("BCC") to consider three types of "technical or administrative changes" in TTBT inspection arrangements. Where the BCC reaches agreements on such revised terms, the new language would not be considered amendments to the treaty or protocol.¹⁸⁵

The first category of possible revisions concerns the timing of the requisite advance notification about scheduled nuclear tests: if the protocol's articulated calendar proves impractical, the BCC may change it.¹⁸⁶ Second, the BCC may, "in the interests of effective implementation," change the protocol's dictates about transportation, food, lodging, and provision of services for inspecting personnel.¹⁸⁷ Third, more generally, the BCC may develop new provisions where "the Parties determine that modifications to verification procedures, including modifications resulting from improvements in existing technologies, would enhance effective implementation of the basic aims" of the agreement.¹⁸⁸

This time, however, the Senate was not quite so compliant. When Ronald Lehman II, Director of the U.S. Arms Control and Disarmament Agency, testified before the Senate Foreign Relations Committee on July 17, 1990,¹⁸⁹ he and other witnesses were questioned about the distinction between formal amendments and informal changes or modifications,¹⁹⁰ and Senator Richard G. Lugar

¹⁸⁵ 1990 TTBT Protocol, § XI, ¶¶ 1(c), 2-4 (cited in note 37). See also Protocols to the Threshold Test Ban and Peaceful Nuclear Explosions Treaties with the Union of Soviet Socialist Republics, Message from the President, Treaty Doc 101-19, 101st Cong, 2d Sess 239-40 (Jun 28, 1990) (official State Department section-by-section analysis of the protocol refers to the § XI provisions as permitting changes in "technical, administrative or operational matters that may require adjustment in light of practical experience with verification activities, but that do not implicate the major obligations or policies of the TTBT or the Protocol").

¹⁸⁶ 1990 TTBT Protocol, § XI, ¶ 2 (cited in note 37). Section IV establishes a detailed calendar for advance notification of nuclear tests, with different types of information to be exchanged in several rounds, starting as much as 200 days prior to the explosion.

¹⁸⁷ *Id.*, § XI, ¶ 3. Section X specifies in considerable detail the host country's obligation to provide the inspecting personnel with the necessary logistical support.

¹⁸⁸ *Id.*, § XI, ¶ 4.

¹⁸⁹ Threshold Test Ban and Peaceful Nuclear Explosions Treaties with the U.S.S.R., Hearings before the Senate Committee on Foreign Relations, S Hrg 101-1090, 101st Cong, 2d Sess (1990).

¹⁹⁰ *Id.* at 37-38, 111-12. See also *id.* at 94-106 (discussion with members of the Intelligence Committee regarding the informal modifications power).

(R-Ind) sent a follow-up letter to press the point.¹⁹¹ In reply, Lehman wrote for the administration that since the protocols raised “a multitude of technical and administrative details and procedures with which we have had little operating experience,”¹⁹² there was an “open question whether each of the logistical arrangements and operating requirements set forth in the Protocols is adequately described or optimally suited to the needs of the Parties.”¹⁹³ The modifications, he affirmed, “would not be changes to the Treaty intent, only changes in the modality of fulfilling that intent”¹⁹⁴ and they “would not alter substantive rights.”¹⁹⁵ Regarding relations with Congress, Lehman wrote:

In implementing the Protocols, we will include continuing consultations with the Senate. Briefings should be a matter of course. Any proposed amendment would be the subject of specific consultations with the Senate, and following negotiation would be subject to advice and consent. While any change of the nature described in paragraphs 2, 3, or 4 of Section XI of the TTBT Protocol would be a matter of public record, we would also expect close consultation on modifications or improvements. It is the Administration’s desire to work closely with the Senate to ensure that all steps are being taken to foster confidence in compliance.¹⁹⁶

Even these assurances, however, proved unsatisfactory. The Senate Select Intelligence Committee reported that executive branch statements had not satisfactorily guaranteed that important treaty changes would be subject to the constitutional amendment procedures. It recommended that additional statements be sought, through which the President would undertake to provide prior notice about any proposed treaty alterations that might have an impact on American verification capabilities, “before the issue becomes moot.”¹⁹⁷ Similarly, Senator Claiborne Pell (D-RI), chair

¹⁹¹ Letter from Senator Richard G. Lugar to Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency (Jul 20, 1990) (on file with U Chi L Rev).

¹⁹² Response to Letter from Richard G. Lugar to Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency 2 (Jul 20, 1990) (cleared Aug 20, 1990) (on file with U Chi L Rev).

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 4.

¹⁹⁶ *Id.*

¹⁹⁷ U.S. Capability to Monitor Soviet Compliance with the Threshold Test Ban Treaty (TTBT) and the Treaty on Peaceful Nuclear Explosions (PNET), Report of the Senate Select Committee on Intelligence, S Rep No 101-462, 101st Cong, 2d Sess 7-8 (Sep 14, 1990).

of the Foreign Relations Committee, wrote to Lehman that additional clarification was needed:

I expect the Committee to recognize that there is a need for an expedited modification of purely technical matters in the cases of highly detailed agreements such as the Protocol. However, the Committee's report will make it clear that the Committee will allow modification only on a case-by-case basis. The Committee would expect the Administration to inform it of any proposed modification under this procedure. This will enable the Committee to voice an objection in appropriate cases, before the issue becomes moot.¹⁹⁸

Lehman replied with two further letters, reiterating that the informal modification routine would be used only for changes "of a technical, administrative or procedural nature as do not affect substantive rights and obligations,"¹⁹⁹ and that consultations with the Senate would be a continuing "matter of course."²⁰⁰ He also wrote that in order to prevent the consultation process from becoming moot, the Senate would be advised "prior to such modifications or changes becoming binding on the Parties,"²⁰¹ but he added that this further assurance was offered "because of the unique technical nature" of the protocol, and that the administration "does not consider this further assurance to be a precedent for other arms control agreements with similar provisions that may be concluded in the future."²⁰² With that predicate, the Foreign Relations Committee concluded that no further conditions or statements were necessary, and the members unanimously recommended ratification.²⁰³

To date, there has been no experience with the modification provisions of these protocols, and no "non-amendments" are immediately in prospect. The Soviet Union and its successor states have so far suspended all nuclear testing, a moratorium that has

¹⁹⁸ Letter from Senator Claiborne Pell to Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency (Jul 31, 1990) (on file with U Chi L Rev).

¹⁹⁹ Letter from Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency, to Senator Claiborne Pell 1 (Sep 11, 1990) (on file with U Chi L Rev).

²⁰⁰ *Id.* at 2.

²⁰¹ Letter from Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency, to Senator Claiborne Pell (Sep 14, 1990) (on file with U Chi L Rev).

²⁰² *Id.* Lehman also wrote a separate letter to the Senate Select Committee on Intelligence, specifically assuring members that they, too, would be informed in advance of any modifications to the TTBT within their jurisdiction. Letter from Ronald F. Lehman II, Director, U.S. Arms Control and Disarmament Agency, to Senator David L. Boren (Sep 20, 1990) (on file with U Chi L Rev).

²⁰³ Threshold Test Ban and Peaceful Nuclear Explosions Treaties, S Exec Rep No 101-31, 101st Cong, 2d Sess 17-18 (Sep 14, 1990).

deferred many of the operational aspects of the treaties' verification system.²⁰⁴

C. The CFE Treaty

In late 1991, the Senate addressed these same issues in the context of the ratification of the CFE Treaty. This time, the authorization for an informal change procedure was written in more expansive, less constrained terms, and placed in the text of the treaty itself:

The Joint Consultative Group may propose amendments to this Treaty for consideration and confirmation in accordance with Article XX [the article establishing a fairly standard amendment process]. The Joint Consultative Group may also agree on improvements to the viability and effectiveness of this Treaty, consistent with its provisions. Unless such improvements relate only to minor matters of an administrative or technical nature, they shall be subject to consideration and confirmation in accordance with Article XX before they can take effect.²⁰⁵

This provision largely escaped attention during the rather truncated Senate ratification hearings,²⁰⁶ and the parties have not yet had occasion to invoke any modification procedures.²⁰⁷ However, during the ratification process, the Senate did focus considerable attention upon a somewhat different type of "modifications" problem: the question of what would occur within the treaty regime when the unraveling of the Soviet Union accelerated and various regions (especially the republic of Ukraine, where substantial conventional and nuclear forces are located) achieved juridical independence. Ultimately, the Senate attached a condition to the resolution of ratification. It specified that if those developments threatened to effect changes in the strategic situation, and if the new state or states did not become parties to the CFE Treaty, the President would be required to consult with the Senate, to convene

²⁰⁴ Graham Interview (cited in note 164).

²⁰⁵ CFE Treaty, Art XVI, § 5 (cited in note 32).

²⁰⁶ The CFE Treaty, S Exec Rep No 102-22, 102d Cong, 1st Sess (Nov 19, 1991); Graham Interview (cited in note 164).

²⁰⁷ There have already been some modifications in the CFE agreement, as the parties have reached a solution to the problem of how to take account of certain Soviet or Russian naval infantry units, concerning which a controversy arose after the treaty was signed. These modifications, however, were not implemented via the "viability and effectiveness" provisions under study here. Graham Interview (cited in note 164).

an extraordinary conference of state parties, and to submit any resulting changes in the treaty regime to the Senate for fresh advice and consent.²⁰⁸ The resolution explicitly conditioned approval of the treaty upon a commitment to return to the Senate for fresh advice and consent, unless the changes in the military circumstances and in the corresponding legal obligations were "a minor matter of an administrative or technical nature."²⁰⁹

D. START

The most important pending arms control accord, the bilateral United States-Soviet Union Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START"), was signed at the Moscow summit meeting on July 31, 1991. The Senate began its consideration of the pact in the spring of 1992, and the inquiry is likely to be exhaustive, befitting a major milestone of far-reaching strategic significance.²¹⁰

The START agreement embraces a series of related documents, including no fewer than seven that contain nearly identical provisions authorizing non-amendment modifications. Typical is the Protocol on Inspections and Continuous Monitoring Activities, specifying the procedures and equipment to be used for selected verification functions. After elaborating the applicable standards with punctilious care, the final paragraph of the protocol adds:

[T]he Parties may agree upon such additional measures as may be necessary to improve the viability and effectiveness of

²⁰⁸ Executive Session on Treaty of Conventional Armed Forces in Europe, 102d Cong, 1st Sess, in 137 Cong Rec S18025 (Nov 25, 1991) (Senator Biden); Eric Schmitt, *Arms Pact Allows for Soviet Breakup*, NY Times A3 (Nov 20, 1991); R. Jeffrey Smith, *Hill, White House Clash on Treaties*, Wash Post A22 (Nov 11, 1991); Dan Oberdorfer and Helen Dewar, *Senate Votes to Assist Soviet Nuclear Cutbacks*, Wash Post A17 (Nov 26, 1991); Pat Towell, *Quick Action Seen for CFE Pact As Senate Panel Sets Vote*, 49 Cong Q No 46, 3398 (Nov 16, 1991); CFE Treaty Report at 116-21 (cited in note 206).

²⁰⁹ United States Senate, Resolution of Advice and Consent to the CFE Treaty, Condition 5 (Nov 25, 1991) (on file with U Chi L Rev); Carroll J. Doherty and Pat Towell, *Senate Panel Endorses Treaty to Cut Forces in Europe*, 49 Cong Q, 3471, 3471 (Nov 23, 1991). If the President decides, despite the changes in the military situation, not to take any action to amend the treaty regime, he is still required to seek a non-binding Senate resolution of support for that continued adherence. *Id.*

²¹⁰ Senator Helms, for example, has already indicated that he intends to oppose the START treaty, in contrast to his support for the CFE treaty. Doherty and Towell, 49 Cong Q at 3471 (cited in note 209). In addition, the Senate's resolution of ratification of the CFE Treaty expressly noted that in evaluating the START accord, the Senate would take into account the Soviet Union's actions regarding compliance controversies that had arisen in connection with the INF Treaty and the ABM Treaty. CFE Resolution, Declaration 4 (cited in note 209).

the Treaty. The Parties agree that, if it becomes necessary to make changes in this Protocol that do not affect substantive rights or obligations under the Treaty, they shall use the Joint Compliance and Inspection Commission to reach agreement on such changes, without resorting to the procedure for making amendments set forth in Article XVIII of the Treaty.²¹¹

E. Open Skies

The most recent application of the non-amendment strategy has come in the Open Skies Treaty negotiations, concluded in Helsinki on March 24, 1992. In this accord, the United States, along with twenty-three other countries, agreed to open its territory for relatively unencumbered aerial overflight and reconnaissance. The treaty does not impose any new substantive disarmament obligations, but it is intended to serve as a "confidence-building measure" to enhance the "transparency" of the parties' military establishments, and to reassure participants that their neighbors and erstwhile antagonists were not violating the reduction provisions of other arms control agreements, massing forces for a surprise assault, or otherwise engaging in threatening military activities.²¹²

During the Open Skies negotiations, several key issues emerged that were resolved only by last-minute compromises reached through high-level diplomacy. Among these were questions such as how many overflights each country would be required to permit (its "passive quota") and how many it would be allowed to conduct over its neighbors (its "active quota") each year; what types of sensors (ordinary photography, video cameras, infrared sensors, particulate samplers, synthetic-aperture radars, and others) would be permitted; and which participants would have access to the data that would be acquired on an overflight.²¹³

Remarkably, many of these key questions, once resolved, were then put back into the hopper for possible future redetermination

²¹¹ START Agreement, Protocol on Inspections and Continuous Monitoring Activities, Art XVIII, § 4 (cited in note 40). See also *id.*, Protocol on Procedures Governing Conversion or Elimination, Art IX; *id.*, Protocol on Notifications, Art X; *id.*, Protocol on ICBM and SLBM Throw-Weight, Art II; *id.*, Protocol on Telemetric Information, Art IV; *id.*, Protocol on the Joint Compliance and Inspection Commission, Art VIII; *id.*, Memorandum of Understanding on the Establishment of the Data Base, Art IV.

²¹² *Gist: Open Skies Treaty* (cited in note 108); Amy E. Smithson, *Open Skies Ready for Takeoff*, 48 Bull Atomic Scientists 17 (Jan/Feb 1992).

²¹³ Tucker, 20 Arms Control Today at 20 (cited in note 98); Smithson, 48 Bull Atomic Scientists at 17.

through the treaty's informal modification procedures. Article X.5 provides:

The Open Skies Consultative Commission may propose amendments to this Treaty for consideration and approval in accordance with Article XVI. The Open Skies Consultative Commission may also agree on improvements to the viability and effectiveness of this Treaty, consistent with its provisions. Improvements relating only to modification of the annual distribution of active quotas pursuant to Article III and Annex A, to updates and additions to the categories or capabilities of sensors pursuant to Article IV to revision of the share of costs pursuant to Annex L, Section I, paragraph 9, to arrangements for the sharing and availability of data pursuant to Article IX, Sections III and IV, and to the handling of mission reports pursuant to Article VI, Section I, paragraph 21, as well as to minor matters of an administrative or technical nature, shall be agreed upon within the Open Skies Consultative Commission and shall not be deemed to be amendments to this Treaty.²¹⁴

The Open Skies Treaty has not yet been submitted to the Senate, pending the Consultative Commission's preliminary resolution of several financial and technical details,²¹⁵ and attention has not yet focused on non-amendment or other issues.

F. Future Applications

Numerous other arms control agreements are now under discussion or active negotiation, and many of them could include provisions similar to those cited above. The CW Convention, for example, will have numerous provisions that could be quickly overtaken by the advance of industrial technology. The lists of poisonous chemicals and their precursors, for example, may have to be modified as inventions proceed.²¹⁶ A future United States-Russia agreement on nuclear defensive systems, as well as any accord on various military-related space activities, could incorporate this type of provision, too.²¹⁷ Indeed, if the mechanism proves viable

²¹⁴ Open Skies Treaty, Art X, § 5 (cited in note 105).

²¹⁵ *Gist: Open Skies Treaty* at 257 (cited in note 108).

²¹⁶ See CW Convention Rolling Text, Art XIV (cited in note 35) (expedited amendment procedure applicable to the treaty's annexes listing the covered chemicals).

²¹⁷ Under the umbrella of the Nuclear and Space Talks, the United States and Soviet Union have engaged in sixteen rounds of negotiations on space weapons, covering both anti-satellite and anti-ballistic missile weapons. *Space Weapons: US/USSR Negotiations*, Arms

and acceptable to Congress, some formula for expressing the concept might become boilerplate in future disarmament agreements.

III. THE INTERNATIONAL LAW PERSPECTIVE

A. Legal Principles

International law imposes few limitations upon parties' abilities to change their treaty obligations. In general, states are free to alter their commitments to any extent, at any time, and in any manner, provided that they are reasonably clear about what they are doing and that they reciprocally agree or at least acquiesce in the outcome.

Under the Vienna Convention on the Law of Treaties, for example, the process for negotiating, signing, and bringing an amendment into force is essentially the same as for the original treaty.²¹⁸ Pursuant to standard international law practice, many different types of amendments are regularly proposed to arms control and other agreements,²¹⁹ and many are routinely adopted, with few operational abnormalities.²²⁰ The parties may conclude a small, perfecting accord to plug an unanticipated gap or to right a minor wrong, or they may work up a complete novation, undoing and replacing the original obligations.²²¹ The document may be labeled a protocol, an amendment, a free-standing treaty, or any other term.²²²

Alternatively, parties are free to alter their treaty obligations through the device of unwritten "subsequent practice,"²²³ utilizing

Control Rptr 575.A.1 (Jan 1992); Matthew Bunn, *U.S. Shifts Stance in Defense and Space Talks*, 21 Arms Control Today 19 (Nov 1991).

²¹⁸ Vienna Convention, Art 39 (cited in note 128).

²¹⁹ See, for example, Tom A. Zamora, *LTBT Amendment Conference to Continue, But No Test Ban in Sight*, 21 Arms Control Today 14 (Mar 1991) (reporting proposals to amend the LTBT to transform it into a comprehensive prohibition against all nuclear explosions).

²²⁰ Marjorie M. Whiteman, 14 Dig Intl L § 36 at 418 (Department of State Publication No 8547, Sep 1970).

²²¹ See Vienna Convention, Art 30 (cited in note 128) (when successive treaties deal with the same subject matter, the newer document will ordinarily govern relations between states that are parties to both agreements).

²²² Restatement at § 301, Comment a (cited in note 47). See also *One on One*, 38 Defense News 14 (Sep 2, 1991) (interview with Michael Moodie, Assistant Director, U.S. Arms Control and Disarmament Agency) (discussing proposals to negotiate a verification protocol to amend the BWC).

²²³ Vienna Convention, Art 31, § 3(b) (cited in note 128); Restatement at § 334, Reporters' Note 2; § 325, Comment c (cited in note 47). See also Richard D. Kearney and Robert E. Dalton, *The Treaty on Treaties*, 64 Am J Intl L 495, 525 (1970) (recounting the negotiating history of the Vienna Convention provisions on modification of treaty language through subsequent state behaviors).

the opaque process of evolving customary international law to supersede the textual obligations.²²⁴ A de facto amendment may be expressed in an exchange of diplomatic notes, in the minutes of a joint treaty-implementation body, or in no written form at all.²²⁵ As long as the sovereign states freely agree, international law poses few formal impediments to their intentionally crafting and remaking their international commitments.²²⁶

The Vienna Convention does incorporate some specialized vocabulary, differentiating "amendment" from "modification" of multilateral treaties.²²⁷ That is, technically, an "amendment" is a proposal that all parties to the treaty are entitled to join; each state has the right to participate in the negotiation and to become party to the change.²²⁸ A "modification," on the other hand, is an intramural agreement among some, but not all, of the parties to alter the obligations only among themselves.²²⁹ If a modification would not compromise the rights of the excluded parties and is not otherwise prohibited by the underlying document, it is fully lawful.²³⁰ This process would create a bifurcated treaty structure, with different sets of obligations obtaining across different pairs of treaty parties. While such an arrangement may be factually messy, it is nonetheless legally coherent.²³¹

Existing multilateral disarmament agreements have used the freedom accorded by international law to craft a variety of amend-

²²⁴ Customary international law, based upon the repeated public actions of states, is binding as an expression of consensus within the international community of states. It evolves from general, continuous, notorious patterns of behaviors, that are based on a sense of legal obligation, and is susceptible to change in the same fashion. Restatement at § 102 (cited in note 47).

²²⁵ Vienna Convention, Art 13 (cited in note 128). The Vienna Convention does not apply to unwritten agreements, but such agreements may nonetheless be fully binding under customary international law. *Id.* at Art 3; Restatement at § 301, Comment b.

²²⁶ International law does prohibit any treaty that conflicts with a norm of "jus cogens" or peremptory international law, deemed so fundamental that no derogation is permitted. Vienna Convention, Art 53 (cited in note 128); Restatement at § 331, Comment e (cited in note 47).

²²⁷ Vienna Convention, Arts 39-41.

²²⁸ *Id.* at Art 40. See also Louis Henkin, et al, *International Law: Cases and Materials* 457 (West, 2d ed 1987) (noting that this element of the Vienna Convention resolved a point that had previously been disputed in customary international law).

²²⁹ Vienna Convention, Art 41.

²³⁰ *Id.*

²³¹ The Vienna Convention also authorizes the creation of this type of complex array of overlapping but not identical treaty obligations in its provisions regarding the filing of reservations and objections. *Id.* Arts 19-23.

ment procedures.²³² Probably the most common system is that specified by the Outer Space Treaty, which provides that an amendment enters into force only for those states that accept it, and only when it is accepted by a majority of treaty parties.²³³ Other treaties provide extra perquisites for specified states that have played a leading role in negotiating or sustaining the agreement. The LTBT, for example, ensures a veto for each of the three "Original Parties" (the United States, the United Kingdom, and the Soviet Union): unless all three vote for the amendment and deposit instruments of ratification of it, it is without force for any of the parties.²³⁴ Remarkably, the LTBT also specifies that once the amendment has achieved this support from the majority (including the three Original Parties), it enters into force for *all* parties, not merely for those who have accepted it.²³⁵

The current multilateral negotiations toward a Chemical Weapons Convention have not yet settled upon an amendment

²³² Bilateral arms control agreements generally provide that the parties may consider amendments (often within the context of a standing consultative body or process) and that any amendments will enter into force pursuant to the same domestic constitutional processes of each state applicable to the treaty itself. See ABM Treaty, Art XIII, § 1(f); Art XIV (cited in note 1); PNET, Art V, § 1(e); Art VIII, § 3 (cited in note 17); INF Treaty, Art XVI (cited in note 28).

²³³ Outer Space Treaty, Art XV (cited in note 12). See also Seabed Arms Control Treaty, Art VI (cited in note 12); BWC, Art XI (cited in note 12).

²³⁴ LTBT, Art II (cited in note 9). The LTBT provides that any state may propose amendments to the treaty, that the depository governments shall circulate to all parties any proposed amendments, and that an amendment conference shall be convened if requested by one-third of the parties. Thereafter, an amendment is adopted only pursuant to majority vote of all parties (which majority must include all three Original Parties), and it enters into force only when a majority (again, including the key three) deposits instruments of ratification. *Id.* See also Zamora, 21 Arms Control Today 14 (cited in note 219) (describing the proceedings at the 1991 LTBT Amendment Conference, the only one of its kind ever convened).

The NPT adopts a comparable amendment procedure, providing similar special protection for the states that possess nuclear weapons and for the states that are members of the Board of Governors of the International Atomic Energy Agency. NPT, Art VIII § 2 (cited in note 10).

²³⁵ LTBT, Art II, § 2 (cited in note 9). See also Vienna Convention, Art 30, § 4(b), Art 40, § 4 (cited in note 128) (subsequent amendment or new treaty does not bind a party which does not accept it); Charter of the United Nations, Jun 26, 1945, Art 108, 59 Stat 1031, Treaty Service No 993, 3 Bevans 1153 (amendment enters into force for all parties when ratified by two-thirds of the members, including ratification by all five permanent members of the Security Council); NPT, Art VIII, § 2 (cited in note 10) (amendment enters into force only for those states which deposit instrument of ratification of it); Bernauer, *Chemical Weapons Convention* at 198 (cited in note 4) (the procedure for effectuating amendments, particularly the question of whether an amendment may enter into force for a party that does not accept it, has become one of the most controversial issues in the negotiations regarding a chemical weapons treaty).

procedure, but various types of limitations have been suggested that might provide interesting models for international law practice.²³⁶ Some have proposed that the most critical provisions of the document (for example, those banning the production of all chemical weapons) be excluded from the possibility of amendment, at least for an initial period of ten years.²³⁷ Others have called for a differentiated amendment mechanism through which some of the basic obligations would be difficult to alter, but that permits easier modification in the technical annexes, such as those listing the specific chemical substances to be banned.²³⁸

In all of this, the parties recognize that treaties must be free to evolve over time—arms control agreements, no less than others.²³⁹ As circumstances change, the legal obligations should be adapted to conform better to the parties' current requirements, and international law should not pose an artificial barrier to the realization of the parties' goals.²⁴⁰ One major vehicle for initiating this adaptation process has always been the informal, day-to-day practice of nations, who—operating chiefly through their respective executive branches²⁴¹—interpret the words of the treaty, operate under it, and give it life.

Accordingly, international law has also developed a routine "correction of errors" procedure to provide an efficient and low-key mechanism for resolving difficulties created when various types of minor mistakes (typographical errors, translation inconsistencies, etc.) are discovered after a treaty has been signed. The Vienna Convention provides alternative diplomatic mechanisms for ob-

²³⁶ CW Convention Rolling Text, Art XIV (cited in note 35).

²³⁷ Bernauer, *Chemical Weapons Convention* at 197-99 (cited in note 4).

²³⁸ *Id.* at 198; CW Convention Rolling Text, Art XIV.

²³⁹ Richard A. Falk, *Inhibiting Reliance on Biological Weaponry: The Role and Relevance of International Law*, 17 *Am U J Intl L & Pol* 17, 18 (1986) (treaty rules must allow the parties some latitude in interpreting and operating the accord).

²⁴⁰ International law tightly constrains the unilateral use of the doctrine of "changed circumstances" as a rationale for one party's failure to honor its treaty obligations. The general rule is that treaty terms must be performed in good faith, and the range of valid excuses that could justify non-performance is narrow. Vienna Convention, Arts 26, 46-53, 61-62 (cited in note 128); Restatement at §§ 321, 331, 336 (cited in note 47). Where all the parties consensually agree to modify their treaty obligations, however, international law is permissive.

²⁴¹ See Restatement at § 326(1) (cited in note 47) (noting the special power of the chief executive in asserting the nation's interpretation of treaty commitments in the conduct of international relations). See *United States v Curtiss-Wright Export Corp.*, 299 US 304, 319 (1936) (President is "sole organ" of the United States in its external relations).

taining signatories' concurrence on the corrections.²⁴² The practice of the United States has generally been to implement these corrections via diplomatic notes. Where the error has been discovered only after the treaty has received Senate approval, the executive has proceeded to adopt the correction on its own, without notifying Congress or seeking additional approval.²⁴³ In these instances, however, the scope of the "error" to be rectified is truly *de minimis*, confined to obvious small mistakes where the printed document failed to reflect the parties' clear intentions—not situations where they later changed their minds about the legal arrangements they would prefer.²⁴⁴

Finally, international law provides for "provisional application" of treaty terms, allowing an agreement (or a part of an agreement) to be effectuated even while the various domestic ratification processes are still pending within the several party states.²⁴⁵ This process has become fairly common in recent years, where the negotiating countries seek to begin partial implementation, even

²⁴² Vienna Convention, Art 79 (cited in note 128) (signatories may correct errors by initialing alterations in the text, exchanging appropriate diplomatic instruments, or executing a corrected text of the entire document); Eleanor C. McDowell, *Digest of United States Practice in International Law* 1976 217-18 (Department of State Publication No 8908, 1977) (describing the routine United Nations procedure for correcting errors in signed treaties).

²⁴³ Whiteman, 14 Dig Intl L at § 16 (cited in note 220).

²⁴⁴ Id (citing examples such as minor mistranslations in two United States-Greece treaties and in several multilateral conventions, where errors were corrected through exchanges of diplomatic notes or declarations, not involving congressional participation).

By memorandum of September 29, 1941, State Department Legal Adviser Hackworth noted:

It is my view that the Department is without authority to alter such documents after they have received the approval of the Senate and the President. The time to check on the accuracy of copies of such agreements is before, and not after, they have had the approval of the Senate. The document printed in the Statutes at Large should conform to that approved by the Senate and it is not for us to say whether the changes are important or unimportant, which after all might be a question of judgment and one on which reasonable minds might disagree. I do not think that we have any greater latitude in correcting treaties after the Senate has acted than we do in correcting obvious errors in acts of Congress after they have been passed by the Congress. The treaties are laws to no lesser extent than acts of Congress. They cannot be made except by approval of the Senate. If we should discover some error or discrepancy in a document after it has been sent to the Senate, the only way by which a correction may properly be made is by bringing the matter to the attention of the Senate and obtaining its consent to the proposed correction.

Id at § 16.

²⁴⁵ Vienna Convention, Art 25 (cited in note 128); Kearney and Dalton, 64 Am J Intl L at 514-15 (cited in note 223); United Nations Law of the Sea Bulletin, Special Issue III (Sep 1991) (describing extensive and prolonged activities of the Preparatory Commission for the Law of the Sea, relating to a treaty signed in 1982, but that has not yet entered into force).

prior to completion of the formalities necessary for entry into force.²⁴⁶ Within the United States, the Senate has generally not objected to this type of provisional application, allowing a "jump start" on treaty operations, even while the advice and consent mechanism is underway.²⁴⁷ The CFE Treaty, for example, provided that selected portions would be applied by the parties from the date of signature,²⁴⁸ and the Open Skies Treaty explicitly creates similar procedures.²⁴⁹

B. Precedents in Analogous Fields

In areas other than disarmament, particularly with a few little-noticed multilateral conventions dealing with specific issues in the fields of environmental protection and maritime safety, there are already a few modest precedents for the administration's current effort to extend a non-amendment authority. For example, the 1972 Convention for the Protection of Migratory Birds, concluded between the United States and Japan, contains a detailed Annex listing the particular types of birds that are subject to protection under it.²⁵⁰ Since the parties contemplated that the desired boundaries of the regime might need to be changed quite often, the convention provides that the Annex may be altered by diplomatic

²⁴⁶ Interview with Robert Dalton, Assistant Legal Adviser for Treaty Affairs, United States Department of State (Nov 27, 1991) ("Dalton Interview"). Agreements resolving maritime boundaries, for example, have been provisionally applied, to implement immediately a solution that provides necessary guidance to fishery and other vessels, even prior to entry into force. *Id.*; John C. McNeill, *America's Maritime Boundary with the Soviet Union*, 44 *Naval War College Rev* 46, 46 n 2 (Summer 1991).

²⁴⁷ Dalton Interview (cited in note 246). During the negotiations on the INF Treaty Memorandum of Agreement, see text accompanying notes 166-77, the delegations agreed upon a somewhat different type of provisional application. There, the treaty mandated that verification inspections occur pursuant to a rigid, early timetable, and the American and Soviet inspectors charged with responsibility for conducting those inspections required guidance about the permissible equipment, operations, and functions. The delegations were able to reach early agreement on at least some of the relevant terms and conditions, and they agreed to apply those points provisionally, as practical guidance to the inspection teams, even while the rest of the MOA itself was still under negotiation. Once the MOA was written and signed, it entered into force immediately, without Senate consideration. *Look Interview* (cited in note 145).

²⁴⁸ CFE Treaty, Protocol on the Provisional Application of Certain Provisions of the Treaty (cited in note 32).

²⁴⁹ Open Skies Treaty, Art XVIII (cited in note 105). The United States has stated that the treaty will not be submitted to the Senate for its advice and consent until the international consultation process resolves a series of initial technical and financial details. See *Gist: Open Skies Treaty* (cited in note 108).

²⁵⁰ Convention Between the Government of the U.S. and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar 4, 1972, 25 UST 3329, TIAS No 7990.

note, without Senate approval, even if the parties were to decide to add or delete a significant number of species.²⁵¹ This device has been used at least once.²⁵² Similarly, the 1985 United States-Canada agreement on Pacific salmon,²⁵³ which regulates fishing in transborder rivers and in offshore oceans, contains detailed specifications of each nation's allowable catch.²⁵⁴ It also provides that the regime may be altered by the expedient exchange of diplomatic communications.²⁵⁵

A variation on this practice sometimes lodges the power to approve changes in existing treaty terms with an international organization, especially one possessing the technical competence to render expert, non-political judgments. The 1973 International Convention for the Prevention of Pollution from Ships,²⁵⁶ for example, provides that a party may amend the Convention's technical annexes if the International Maritime Organization approves the amendment, and no other party registers a sufficient objection within a specified period of time.²⁵⁷ The same procedure was later adopted for a 1978 Protocol; again, it provided for no congressional role in implementing future changes.²⁵⁸ Similar rules obtain for the Safety of Life at Sea Convention,²⁵⁹ applicable to safe maritime

²⁵¹ *Id.*, Art II, § 2(c).

²⁵² 25 UST 3373, TIAS No 7990 (September 19, 1974 exchange of diplomatic notes inserted an additional species to those previously listed in the treaty's Annex). See also Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar 3, 1973, 27 UST 1087, TIAS No 8249 (similar provisions govern multilateral convention on protection of rare species; Department of Interior negotiates with other countries to modify the annexes listing the controlled species, and the changes are not considered amendments and are not always transmitted to the Senate under the Case Act); Dalton Interview (cited in note 246).

²⁵³ Treaty with Canada Concerning Pacific Salmon, Jan 28, 1985, Sen Treaty Doc No 99-2, 99th Cong, 1st Sess (1985).

²⁵⁴ *Id.*, Annex IV.

²⁵⁵ *Id.*, Art XIII. The State Department's section-by-section analysis stated that "since Annex IV contains fishery regimes that will be revised routinely and frequently, changes to these regimes will not be submitted to the Senate for advice and consent." 1991 ASIL Proceedings at 485 (cited in note 82) (comments of David Abramowitz).

²⁵⁶ International Convention for the Prevention of Pollution from Ships, Nov 2, 1973, 12 ILM 1319, 1330-33 (not intended to enter into force on its own).

²⁵⁷ *Id.*, Art 16, § (2)(f)(iii).

²⁵⁸ Protocol of 1978 to the International Convention for the Prevention of Pollution from Ships, Art VI, Feb 17, 1978, in S Exec Doc No 96-C, 96th Cong, 1st Sess (1979) (entry into force Oct 2, 1983) (modifying and adding to many of the substantive regulations of the 1973 Convention).

²⁵⁹ 1974 International Convention for the Safety of Life at Sea, Art VIII, § (b)(vi), Nov 1, 1974, 32 UST 47, 52 TIAS No 9700.

construction and operating practices;²⁶⁰ for two protocols to the 1949 Geneva Conventions for the Protection of War Victims;²⁶¹ and for other detailed and technical agreements.²⁶² Only rarely has Congress balked at these procedures.²⁶³

Finally, the Law of the Sea Convention²⁶⁴—the comprehensive “constitution for the oceans,” which is not yet in force but which has already crystallized customary international law on many im-

²⁶⁰ Under the treaty, there is a relatively informal mechanism for implementing amendments to certain technical provisions. These amendments may be “adopted” by a supermajority vote in the expanded Maritime Safety Committee, then circulated to all parties. If no party objects for a two-year period, the amendment is deemed to have been “accepted” and it enters into force without additional documentation. This procedure effectively preserves a veto for the United States and other leading maritime nations, but the power is reserved to the executive—there is no occasion for the Congress to participate in the amendment process. *Id.*, Art VIII, § (b)(vi)(2).

²⁶¹ Protocol I, Jun 8, 1977, 16 ILM 1391; Protocol II, Jun 8, 1977, 16 ILM 1442 (not in force for United States). Under the protocols, the International Committee of the Red Cross is to convene periodic meetings of technical experts to review the treaty’s Technical Annex and prepare draft amendments. A proposed amendment is to be submitted to a conference of treaty parties, and if adopted by a two-thirds vote, it is considered accepted unless rejected within one year by one-third of the parties. Article 18 *bis*; McDowell, *Digest of United States Practice in International Law 1976* at 235-36 (cited in note 242).

²⁶² Arthur W. Rovine, *Digest of United States Practice in International Law 1974* 237-39 (Department of State Publication No 8809, 1975) (describing “tacit amendment” procedure for 1965 Convention on Facilitation of International Maritime Traffic, permitting rapid modification of treaty’s technical annex); Arthur W. Rovine, *Digest of United States Practice in International Law 1973* 183-84 (Department of State Publication No 8756, 1974) (describing similar process, not requiring congressional participation, for modifying INTEL-SAT arrangements).

²⁶³ Dalton Interview (cited in note 246). The International Navigation Rules Act of 1977, Pub L No 95-75, 91 Stat 308, codified at 33 USC § 1601 (1982), authorizes the President to proclaim as United States law certain future internationally-agreed amendments to the Convention on the International Regulations for Preventing Collisions at Sea. However, the legislation also requires the executive branch to print the text of any proposed amendment—once approved by the parties under established treaty procedures—in the Federal Register, and to notify Congress. If Congress passes a resolution of disapproval, the President shall notify the international organization that the United States objects to the amendment, effectively blocking its entry into force. President Carter signed the legislation, but expressed reservations about its constitutionality. President Ford had vetoed an earlier version of the bill, which would have permitted either house of Congress to block any amendment. John A. Boyd, *Digest of United States Practice in International Law 1977* 399-401 (Department of State Publication No 8960, 1979).

Similarly, in considering the 1973 Protocol to the 1949 International Convention for the Northwest Atlantic Fisheries, Congress directed that, even where other parties have endorsed a future proposed amendment, the U.S. executive branch must object to it, precluding its entry into force, until the Senate provides its advice and consent. Rovine, *Digest of United States International Law Practice 1973* at 183-84 (cited in note 262).

²⁶⁴ Convention on the Law of the Sea, Dec 10, 1982, 21 ILM 1261 (not in force) (US has not signed) (“LoSC”).

portant issues²⁶⁵—contains some relevant, controversial provisions on point. Under the convention, amendments may be “adopted” in any of three ways: (1) via consensus at an Amendment Conference;²⁶⁶ (2) through unanimous failure to object to a circulated proposal;²⁶⁷ or (3) pursuant to approval by the convention’s governing bodies.²⁶⁸ After adoption, an amendment may enter into force in two ways. For changes on most subjects, ratification by two-thirds of the parties suffices to bring the amendment into force for those who ratify it.²⁶⁹ However, any amendment dealing with the mining of the deep seabed (the most contentious part of the convention) will enter into force for *all* parties once it has been ratified by three-quarters of the parties.²⁷⁰ This last provision—permitting modification of the crucial financial, technical, and other provisions regulating access to the mineral resources of the deep ocean floor—was cited by the Reagan Administration as one of the key reasons why the United States would not sign the convention.²⁷¹ The United States insisted on a veto, or at least on the ability to prevent itself from being compelled by the majority to accept unfavorable terms, in an area seen as potentially vital to American security and economic well-being.²⁷²

²⁶⁵ Restatement at 4-5 (cited in note 47) (Law of the Sea Convention itself is not currently binding for the United States, but it has been acknowledged as restating or generating binding customary international law on many points.).

²⁶⁶ LoSC, Art 312 (cited in note 264).

²⁶⁷ Id, Art 313 (if any party objects to a proposed amendment within twelve months of its circulation by the Secretary-General of the United Nations, the amendment is considered rejected).

²⁶⁸ Id, Art 314 (applicable to provisions regarding deep seabed mining; requiring approval by the Council and by the Assembly, the leading political organs established by the convention).

²⁶⁹ Id, Art 316, ¶ 1.

²⁷⁰ Id, Art 316, ¶ 5.

²⁷¹ Recent Development, *Law of the Sea—Deep Seabed Mining—United States Position in Light of Recent Agreement and Exchange of Notes with Five Countries Involved in Preparatory Commission of United Nations Convention on the Law of the Sea*, 18 Ga J Intl & Comp L 497, 501-02 (1988); David L. Larson, *The Reagan Rejection of the U.N. Convention*, 14 Ocean Development & Intl L 337, 345, 347 (1985).

²⁷² See Jonathan I. Charney, *The Law of the Deep Seabed Post UNCLOS III*, 63 Or L Rev 19 (1984); Lee Kimball, *The Law of the Sea*, Environment 14, 41-42 (Nov 1983); Larson, 14 Ocean Development & Intl L at 348 (cited in note 271) (United States’ refusal to join the Law of the Sea Convention was driven by the Reagan administration’s conclusion that the deep sea mining regime would be dominated by third world and communist ideology, insufficiently responsive to American commercial and security interests in obtaining timely, efficient access to the scarce metals to be found undersea).

IV. CONSTITUTIONAL LAW

Unlike international law, domestic United States constitutional standards cast grave doubt on the legality and the wisdom of the informal process of treaty amendment, and this Section explores some of the problems. Although a vast literature has now developed regarding the American jurisprudence on various treaty questions, such as interpretation,²⁷³ termination,²⁷⁴ and breach,²⁷⁵ not much has yet been written about the interstices of the amendment process—probably because until the current issue arose, there had been little controversy in the field. Nonetheless, many of the principles and precedents adduced in the allied fields are relevant here.²⁷⁶

A. Background

There are two primary categories of international commitments binding upon the United States. The “treaty,” approved pursuant to a two-thirds vote in the Senate, is the only major vehicle mentioned in the Constitution.²⁷⁷ Over the years, however, international agreements other than treaties (often generically referred to as “executive agreements”) have come to eclipse the treaty route, and two centuries of practice have ensconced them as fully legitimate, notwithstanding the absence of any explicit constitutional reference.²⁷⁸ There are three recognized subcategories of

²⁷³ See John B. Rhinelander, *Arms Control in the Nuclear Age*, in John Norton Moore, Frederick S. Tipson, and Robert F. Turner, eds, *National Security Law* 551, 598-99 (Carolina Academic, 1990); Michael J. Glennon, *Constitutional Diplomacy* 134-45 (Princeton, 1990); Harold H. Koh, et al, *The Treaty Power*, 43 U Miami L Rev 101 (1988); Charles J. Cooper, et al, *What the Constitution Means by Executive Power*, 43 U Miami L Rev 165 (1988).

²⁷⁴ See Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers Between Congress, the President, and the Courts*, in Moore, Tipson, and Turner, eds, *National Security Law* at 798-807 (cited in note 273); Glennon, *Constitutional Diplomacy* at 145 (cited in note 273); Franck and Glennon, *Foreign Relations and National Security Law* at 306-34 (cited in note 64).

²⁷⁵ See Restatement at § 335 (cited in note 47); Ralph Earle and John B. Rhinelander, *The Krasnoyarsk Radar—A “Material Breach” of the ABM Treaty?*, 18 Arms Control Today 9 (Sep 1988).

²⁷⁶ See, for example, Glennon, 77 Am J Intl L 257 (cited in note 122); Henkin, 10 Mich J Intl L 406 (cited in note 78); Randall, 51 Ohio St L J 1089 (cited in note 67) (exploring how United States treaty law applies to a range of controversies).

²⁷⁷ US Const, Art II, § 2, cl 2. The Constitution also refers to other types of documents, such as an “Agreement or Compact” that an individual American state, with the consent of Congress, may conclude with another country. Id at Art I, § 10, cl 3. These have not proven to be of operational importance.

²⁷⁸ *United States v Belmont*, 301 US 324, 330-31 (1937) (distinguishing between a treaty, which requires “participation of the senate,” and certain other international agree-

executive agreements, deriving their lawful authority from diverse sources: (1) those approved by affirmative congressional legislation through a majority vote in each House (prior to or after signature of the agreement);²⁷⁹ (2) those authorized by an antecedent treaty that was itself effectuated through a two-thirds vote of advice and consent by the Senate;²⁸⁰ and (3) those resting upon the sole constitutional authority of the President as chief executive or commander in chief.²⁸¹

The standard mechanism for formally amending or updating a treaty is through the negotiation and ratification of what amounts to another treaty, with all the attendant procedural niceties. An amendment to a treaty (whether it is denominated as such, or as a protocol, addendum, or any other label) is basically a new treaty.²⁸² In contrast, the "non-amendments" under consideration here are mostly executive agreements of the second type.²⁸³ Whether cast as

ments, such as the executive branch creating a protocol recognizing a foreign government, or establishing normal relations with a foreign government, which do not require such participation); Restatement at § 303, Comment a and Reporters' Notes 7-8 (cited in note 47); Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 Yale L J 345 (1955); Comment, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L Rev 1533, 1538-50 (1991).

²⁷⁹ *Altman & Co. v United States*, 224 US 583, 601 (1912); Restatement at § 303(2) (cited in note 47). This avenue was used, for example, in the SALT I Interim Agreement (cited in note 14).

²⁸⁰ *Wilson v Girard*, 354 US 524, 526-29 (1957); Restatement at § 303(3). See Note, *Executive Agreements: Beyond Constitutional Limits?*, 11 Hofstra L Rev 805, 811-15 (1983) (executive agreements pursuant to treaty are quite common and diverse; key interpretation questions have concerned the scope of the treaty's authorization for the subsequent agreement); *Role of the Senate* at 77-79 (cited in note 64); Randall, 51 Ohio St L J at 1093 (cited in note 67).

²⁸¹ *United States v Pink*, 315 US 203, 229-30 (1942); Restatement at § 303(4) (cited in note 47). Section 33 of the Arms Control and Disarmament Act, 22 USC § 2573 (1988), specifies that

no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

This provision purports to prohibit arms control agreements cast as sole executive agreements, but its constitutionality has never been tested.

²⁸² Some treaties specify that an amendment shall enter into force in the same manner as the original treaty. See SALT II Treaty, Art XVIII (cited in note 25); INF Treaty, Art XVI (cited in note 28). The Charter of the United Nations has been amended repeatedly, each time with the advice and consent of the Senate. See, for example, Amendment Adopted by the General Assembly, Dec 17, 1963, 16 UST 1134, TIAS No 5857 (entered into force Aug 31, 1965) (amending the Charter to increase the size of the Security Council from eleven to fifteen).

²⁸³ Despite public preoccupation with the category of executive agreements sustained solely upon the constitutional authority of the President, most of the executive agreements

an exchange of diplomatic notes, as an integrated document opened for signature, or in some other style,²⁸⁴ their legitimacy depends upon the lawfulness and propriety of the original delegation contained in the underlying treaty—the only document that the Senate has explicitly endorsed.²⁸⁵

Conceptually, treaties and all three types of executive agreements are of equal legal dignity. Under the Supremacy Clause,²⁸⁶ each is “the supreme law of the land” under the Constitution, and they are largely interchangeable instruments.²⁸⁷ The choice about which form to use in crafting an international obligation is much more political than legal.²⁸⁸ This equivalence is further demonstrated by invocation of the usual *lex posterior* hierarchy in the rules of interpretation: in the event of a conflict between successive documents, the latest in time will prevail. Therefore, the newest

concluded by the United States are undertaken pursuant to either a prior treaty or another expression of congressional approval. Turner, *Constitutional Framework* at 807-08 (cited in note 274) (citing a 1964 State Department survey concluding that 97% of all executive agreements were in the category of cases “deriving all or part of their legal authority from a treaty or statute”).

²⁸⁴ International agreements, including the various types of executive agreements, may be equally valid whether concluded in a single document or many, and whatever their title. Vienna Convention, Art 2, § 1(a) (cited in note 128); Franck and Glennon, *Foreign Relations and National Security Law* at 242 (cited in note 64).

²⁸⁵ Turner, *Constitutional Framework* at 809 (cited in note 274) (executive agreements pursuant to treaty are very common; they derive their powers from the Senate’s approval of the original treaty). See *Coplin v United States*, 6 Cl Ct 115, rev’d on other grounds, 761 F2d 688 (Fed Cir 1985), aff’d as *O’Connor v United States*, 479 US 27 (1986); *Swearingen v United States*, 565 F Supp 1019 (D Colo 1983) (upholding executive agreements implemented subsequent to an authorizing treaty); *Role of the Senate* at 146-47 (cited in note 64).

²⁸⁶ US Const, Art VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁸⁷ *Weinberger v Rossi*, 456 US 25, 29-32 (1982); Restatement at § 303, Reporters’ Note 8 (cited in note 47); Myres J. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 Yale L J 181 (1945). But see Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L J 616 (1945).

²⁸⁸ Circular 175 and 11 Foreign Affairs Manual contain the State Department guidance regarding factors to consider in selecting the form of an agreement. Generally, the weightier, more important, long-duration accords are supposed to be cast in treaty form, but the practice has varied substantially. Restatement at § 303, Reporters’ Note 8 (cited in note 47). See also International Agreements Consultation Resolution, S Rep No 95-1171, 95th Cong, 2d Sess (1978) (expressing Senate preference for use of the treaty form, and the desire for close consultation regarding the executive’s choices). Until very late in the negotiating process, the United States hesitated about whether to cast the SALT II Treaty (cited in note 25) as a treaty or an executive agreement, with the ultimate decision turning on a political reading of the preferences of the two houses of Congress. Comment, 38 UCLA L Rev at 1582-85 (cited in note 278).

document—whatever its denomination—will supersede its precursors as the effective rule of domestic law (although American practice in this regard is somewhat inconsistent,²⁸⁹ and many of the crucial combinations or sequences have never been tested in practice).²⁹⁰

B. Legal Analysis

Strict application of the above principles would seem to authorize a very expansive executive power for informal modification of treaties. That is, if the Senate, in approving an initial treaty, explicitly authorizes the executive to conclude follow-on accords that supplement or modify the terms, then a later executive agreement within that delegated scope would appear to be fully warranted.²⁹¹ The delegation of authority could, in principle, proceed far beyond merely technical, administrative, or procedural points into real substantive questions. If the Senate were comfortable with only a more limited delegation of power, then the treaty could be crafted (or reservations could be entered) to permit only certain types of modifications, or to require a second legislative review.²⁹² Moreover, Congress could at any time change the rules through the enactment of new legislation, which could effectively withdraw or modify the power to conclude subsequent executive agreements, or supersede any particular one of them.²⁹³

²⁸⁹ *Role of the Senate* at 141 (cited in note 64).

²⁹⁰ Restatement at § 115 (cited in note 47) (treaty and executive agreement are both supreme law, but uncertainty persists about whether a sole executive agreement could effectively supersede a contrary statute). See *United States v Guy W. Capps, Inc.*, 204 F2d 655 (4th Cir 1953), *aff'd* on other grounds, 348 US 296 (1955) (declining to enforce sole executive agreement conflicting with prior statute, where the controversy arose in the area of regulation of foreign commerce, a power committed to the Congress in the Constitution, and therefore inappropriate for a sole executive agreement). Significantly, this controversy concerns only the power of a sole executive agreement to supersede a prior statute as a matter of domestic United States law. There is little doubt about the authority of either of the other types of executive agreement to supersede an earlier contrary statute, nor about the power of any of the three instruments to create binding international obligations for the United States.

²⁹¹ There have been controversies about whether the subsequent executive agreement was, in fact, within the contemplated scope established by the earlier treaty, but the principle of authorization seems clearly established. Randall, 51 Ohio St L J at 1093 (cited in note 67).

²⁹² Restatement at § 303, Comment d (cited in note 47) (Senate may condition its advice and consent in almost any way).

²⁹³ *Id.* at § 115 (act of Congress may supersede contrary international agreement, if intention to do so is clear; doing so would create a new rule for enforcement in United States courts, but would not relieve the United States of its international obligation in the event of breach).

A distinction should be made here between those follow-on agreements that merely "fill gaps" that have been deliberately or inadvertently left in the underlying treaty, and those other agreements that depart from the express terms of the original accord.²⁹⁴ In arms control as in other areas, the former type of subsequent accord is less problematic; the President must possess at least some degree of inherent responsibility for inserting a consensus meaning into the interstices of a vague or general treaty.²⁹⁵

Thus, even where (as has usually been the case, until recent years) the treaty is silent regarding procedures for fleshing out a text, the duty as a practical matter must fall to the executive.²⁹⁶ It is the executive branch that operates the treaty for the United States, interprets its terms, and engages in the "subsequent practice" that gives the treaty meaning and supplies many of the needed functional details.²⁹⁷ Whether this type of operational agreement between the parties is reduced to written text, or whether it remains an informal pattern of action and acquiescence, it would seem to be a logical component of the executive power.²⁹⁸

²⁹⁴ There are also some international agreements, such as the detailed technical arrangements commonly concluded at the working level of American and foreign government bureaucracies, that slip entirely beneath the coverage of the constitutional system. Kuchenbecker, 18 Colum J Transnatl L 1 (cited in note 64); Johnson, *Making of International Agreements* at 127-29 (cited in note 64). In the prototypical example, if a formal international agreement obligates the United States to sell 1,000 tractors to a particular country, a subsequent agency-to-agency communication might specify the delivery date and type of tractor for the first shipment. This secondary arrangement would be fully binding but would likely not be considered an international agreement for purposes of the Case Act or other formal proceedings. Arthur W. Rovine, *Separation of Powers and International Executive Agreements*, 52 Ind L J 397, 405-06 (1977).

²⁹⁵ See Restatement at § 325 (cited in note 47) (subsequent agreements between treaty parties, as well as their subsequent practice, are to be taken into account in interpreting a treaty); 1991 ASIL Proceedings at 497 (cited in note 82) (remarks of Thomas Graham, Jr.) (executive branch, operating through treaty's implementation bodies, elaborates the necessary details for implementing arms control agreements).

²⁹⁶ See Senate Foreign Relations Committee Memorandum of Law on Choice of Instruments for Sinai Accords, reprinted in Franck and Glennon, *Foreign Relations and National Security Law* at 406-09 (cited in note 64) (agreement may be very vague and indefinite, leaving substantial discretion to executive in later implementation).

²⁹⁷ Louis Henkin, *Foreign Affairs and the Constitution* 44-65 (Foundation, 1972) (discussing the scope of presidential foreign affairs power). See *United States v Curtiss-Wright Export Corp.*, 299 US 304 (1936).

²⁹⁸ See State Department Airgram to All Diplomatic Posts Concerning Criteria for Deciding What Constitutes an International Agreement (Mar 9, 1976), reprinted in Franck and Glennon, *Foreign Relations and National Security Law* at 389, 393 (cited in note 64) (specifying types of implementing agreements required to be reported to Congress).

Presidents have always performed this type of function; now the mechanism is simply more overt.²⁹⁹

Justice Jackson's famous concurrence in the *Steel Seizure Case*³⁰⁰ provides the three-part analytical framework that may be adapted to this context. That is, where the original treaty (as approved by the Senate) has expressly authorized the creation of subsequent agreements, indicating that they may be effectuated without additional legislative scrutiny, the President's power is at its zenith, for it assumes all the powers of the executive as well as all that may lawfully be delegated by the Congress. Second, where the treaty (and any other relevant congressional pronouncements) is silent about future use of any implementation function, there is a "zone of twilight," and the President may rely only upon executive branch inherent constitutional powers. These powers would often, but not always, be sufficient to sustain a gap-filling accord cast as a sole executive agreement or an unwritten pattern of behavior. Finally, if the original treaty were to specify that no inserts could be effectuated without legislative approval, the President would have only the smallest residual power. Even this, however, might be sufficient to authorize certain types of agreements as being inherently within the Constitution's grant of powers to the President.³⁰¹

However, any subsequent agreement that purports to *change* the prior treaty terms, instead of simply to *supplement* them, presents a more complex puzzle.³⁰² In acute form, the question presented is: How far may the Senate lawfully go in delegating to the President the authority to re-craft the presented terms in future agreements free from additional legislative oversight and approval?

²⁹⁹ Restatement at § 326 (cited in note 47); W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 Yale J Intl L 316 (1990). But see Borchard, 54 Yale L J at 650-52 (cited in note 287) (limitations on President's discretion to modify a treaty through executive agreements).

³⁰⁰ *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 635-38 (1952) (Jackson concurring).

³⁰¹ See Restatement at § 1, Reporters' Note 3 (cited in note 47); Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 142 (Yale, 1990) (courts seeking to sustain a presidential action or agreement will strive to move a case from Jackson's second category into his first, and will stretch to interpret even the legislature's silence and inaction as constituting congressional acceptance or acquiescence). See also Randall, 51 Ohio St L J 1089 (cited in note 67) (evaluating the scope of sole executive power and shared executive-legislative power in creating international agreements).

³⁰² As noted in text accompanying notes 337-43, the distinction between "filling the gaps" and "changing the standards" may be elusive in practice. At some point, the accretion of inserts may become so substantial as to constitute a new accord.

American legal and political history is rife with conflict over issues similar to this, testing the resiliency of the separation of powers. The Constitution deliberately serrated the foreign affairs powers, according both the legislature and the executive a partial role in creating treaties, conducting hostilities, governing international trade, etc.³⁰³ The Founders consciously fomented inter-branch tension in this area, refusing to cede either branch a definitive, comprehensive upper hand, but trusting the "inefficiency" of the checks and balances to safeguard the republic.³⁰⁴

In the context of these "fissured" powers,³⁰⁵ each branch has a role to play in the back-and-forth process of creating international obligations.³⁰⁶ First, the President negotiates a treaty (increasingly, with participation of congressional observers).³⁰⁷ Next, the Senate provides advice and consent (sometimes accompanied by conditions or other types of declarations).³⁰⁸ The President "makes" the treaty by exchanging instruments of ratification. The Congress may then be called upon to sustain the agreement, by providing funds or other actions necessary to discharge American responsibilities.³⁰⁹ Finally, the President will enforce the treaty, interpreting its meaning on behalf of the United States³¹⁰ and engaging in

³⁰³ See Franck and Glennon, *Foreign Relations and National Security Law* at 227-41 (cited in note 64); Turner, *Constitutional Framework* at 749-806 (cited in note 274) (tracing the constitutional origins of the treaty power).

³⁰⁴ See especially Federalist 64 (Jay) in Clinton Rossiter, ed, *The Federalist Papers* 450-51 (Mentor, 1961) (declaring that the treaty power will "partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them"). See also Louis Fisher, *Constitutional Conflicts Between Congress and the President* 7-9 (Kansas, 3d ed 1991) (purpose of the separation of powers was not merely to hamstring potential despots, but to develop a practical method of government).

³⁰⁵ Henkin, *Foreign Affairs and the Constitution* at 32 (cited in note 297) (foreign affairs powers are not neatly separated between the branches); Elliot L. Richardson, *Checks and Balances in Foreign Relations*, 83 Am J Intl L 736 (1989); Eugene V. Rostow, *President, Prime Minister, or Constitutional Monarch?*, 83 Am J Intl L 740 (1989).

³⁰⁶ *Role of the Senate* at 8-14 (cited in note 64) (describing steps in the making of a treaty).

³⁰⁷ Whiteman, 14 Dig Intl L at 53-55 (cited in note 220).

³⁰⁸ Glennon, 77 Am J Intl L at 263-66 (cited in note 122).

³⁰⁹ Some treaties are "self-executing," requiring no further legislative action in order to become effective, while others rely upon additional statutes or other law to become a rule of decision for United States courts. Franck and Glennon, *Foreign Relations and National Security Law* at 274-96 (cited in note 64).

³¹⁰ The President exercises the lead responsibility for the United States in engaging in the types of international conduct that provide meaning to international agreements. The President undertakes the initiatives, and responds to the actions of other parties, that constitute "state practice" in interpreting treaties and in creating customary international law. Restatement at § 326 (cited in note 47).

the types of "subsequent practice" that flesh out its contents.³¹¹ Each step must be meaningful; none can be evaded or delegated wholesale. The advice and consent function, as with all the others, must be taken seriously, not reduced to automatically authorizing some unknown future "pig in a poke."

The balance of effective powers between the two branches has oscillated according to the personalities and politics of the era, continuously testing the constitutional scheme.³¹² As the Supreme Court noted in 1981 in *Dames & Moore v Regan*,³¹³ while upholding the extraordinary assertion of executive powers that resolved the Iran hostages crisis:

we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.³¹⁴

The landmark decision in *Immigration and Naturalization Service v Chadha*,³¹⁵ where the Supreme Court overturned decades of daily practice by invalidating the "legislative veto" process,³¹⁶

³¹¹ Under the Vienna Convention, the subsequent practice of the parties to a treaty, applying its terms, is an important source to be taken into account in its interpretation. Vienna Convention, Art 31, § 3(b) (cited in note 128). See also Robert F. Turner, *Separation of Powers in Foreign Policy: The Theoretical Underpinnings*, 11 Geo Mason U L Rev 97, 111-13 (1988); Thomas M. Franck, *Improving the Performance of Congress in Foreign Policy*, 11 Geo Mason U L Rev 183 (1988) (criticizing Congress for attempts to "micromanage" the conduct of United States foreign policy by excessively constraining the executive).

³¹² See Fisher, *Constitutional Conflicts* at 6-12 (cited in note 304) (sketching history of the balance of power between the branches); Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 Geo Wash L Rev 401 (1989); and Turner, 11 Geo Mason L Rev at 116 (cited in note 311) (controversy over the separation of powers has increased during the last decade, reflected in increases in the number of constitutional cases in litigation and the number of statutes related to foreign relations). See also Cooper, et al, 43 U Miami L Rev at 188 (cited in note 273) (comments of Eugene V. Rostow) (President should initiate and exercise the foreign affairs power, with Congress operating merely as a check against excesses); Koh, et al, 43 U Miami L Rev at 101 (cited in note 273) (comments of Abraham D. Sofaer) (Senate attempts to expand its powers whenever it is politically expedient to do so); id at 106 (comments of Harold H. Koh) (throughout the 1980s, executive branch has asserted increasingly expansive treaty powers).

³¹³ 453 US 654 (1981).

³¹⁴ Id at 662.

³¹⁵ 462 US 919 (1983).

³¹⁶ The legislative veto, in one form or another, had been built into some 200 statutes since 1932, many of them enactments concerning foreign affairs. Id at 968, 1003 (White

provides another critical perspective on the inter-branch power relationship. Advocates of the legislative veto had stressed its long history, its efficiency, and its practical accommodation of the interests of both Congress and the President. Even if there were no textual support for the procedure in the Constitution, they argued, the legislative veto should be sustained as a pragmatic adaptation to the pressures of the modern era.³¹⁷ The Supreme Court, however, gave short shrift to that line of argument, demanding a more exacting fealty to the lawmaking processes of the Constitution, in words that resonate with the current non-amendment controversy:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.³¹⁸

Insisting upon compliance with the formalities of bicameralism and presentment,³¹⁹ the Supreme Court spoke forcefully against the sentiment that expedited procedures and simplified standards ought to be applied to usher the republic into its third

dissenting) (Annex listing legislative veto statutes, including twelve under the heading "Foreign Affairs and National Security"); Turner, *Constitutional Framework* at 857 (cited in note 274).

³¹⁷ Legislative vetoes appended to statutes in the national security area had proven especially controversial, affecting the alignment of legislative and executive authority in areas such as the War Powers Resolution, 50 USC § 1544(c) (1988). Turner, *Constitutional Framework* at 857-58 (cited in note 274).

³¹⁸ 462 US at 959.

³¹⁹ The *Chadha* decision itself concerned only the procedure of "one house veto," where either house of Congress could invalidate a federal regulation or other executive action through a simple resolution. Shortly thereafter, in *United States Senate v FTC*, 463 US 1216 (1983), the Court also struck down the "two house veto," which utilized a concurrent resolution—requiring approval by both houses, but evading the constitutional step of presentment to the President for signature or veto.

century, even where foreign policy was concerned.³²⁰ Using language that would be strikingly apt in responding to the current lure of an informal process for amending treaties, the Supreme Court resisted the “hydraulic pressure” of modern government, where any branch might seek to exceed its constitutional confines in the pursuit of laudable objectives.³²¹ The Court expressly refused to sanction a “political invention” on solely utilitarian grounds if it was offensive to the Constitution.³²²

Behind this dialogue lie the hoary themes of the “delegation doctrine,” perhaps suddenly ready for reassertion in the current context.³²³ The principle of non-delegation—prior to *Chadha*, mostly honored in the breach—holds that where the Constitution explicitly assigns a power or responsibility to a particular organ or officer of government, that power may not ordinarily be delegated elsewhere. In particular, the uniquely “legislative” powers of Congress under the Constitution are inalienable.³²⁴ There are limits, therefore, on the ability of Congress to authorize the President to perform its legislative task of treaty approval.³²⁵

Over the years, the delegation doctrine has been progressively attenuated in successive cases, yielding to the arguments asserting

³²⁰ Some earlier decisions by lower courts had suggested that the legislative veto process might be more viable in the arena of foreign affairs. *Consumer Energy Council of America v FERC*, 673 F2d 425, 459 (DC Cir 1982), aff'd, 463 US 1216 (1983); *American Federation of Government Employees v Pierce*, 697 F2d 303, 308 (DC Cir 1982) (statement of Judges Wald and Mikva supporting rehearing en banc) (arguing that each type of legislative veto statute should be scrutinized independently for constitutionality). The Supreme Court, however, hinted at no such distinction. See Stephen Dycus, et al, *National Security Law* 116-18 (Little, Brown, 1990); Koh, *The National Security Constitution* at 141-42 (cited in note 301).

³²¹ 462 US at 951.

³²² Id at 945 (commenting on Justice White's dissent).

³²³ See generally Fisher, *Constitutional Conflicts* at 85-99 (cited in note 304); Dycus, et al, *National Security Law* at 102-04 (cited in note 320); Peter M. Shane and Harold H. Bruff, *The Law of Presidential Power: Cases and Materials* 64-88 (Carolina Academic, 1988); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich L Rev 1223, 1260-65 (1985).

³²⁴ Some congressional lawyers have even argued that since the Constitution expressly delegates to Congress the power to regulate foreign commerce, the President has no inherent authority even to negotiate international tariff reduction agreements without a specific legislative authorization. Barry E. Carter and Phillip R. Trimble, *International Law* 174-75 (Little, Brown, 1991). See also Restatement at § 303, Reporters' Note 10 (cited in note 47) (Congress occasionally delegates authority for negotiating international agreements to officials other than the President, such as the Postmaster General).

³²⁵ Sotiros A. Barber, *Delegation of Power*, in Leonard Levy, Kenneth Karst, and Dennis Mahoney, eds, 2 *Encyclopedia of the American Constitution* 552-53 (Free Press, 1986). See also *Chadha*, 462 US at 952-55 (discussing the definition of “legislative tasks” that may not be delegated).

the necessity for adapting the Constitution to the demands of modern life.³²⁶ The current articulation of the doctrine holds that a congressional delegation to executive branch officials is permissible where it is accompanied by adequate "legislative standards" or "intelligible principles" guiding the recipient of the powers and shaping the executive branch autonomy within congressionally-defined goals or standards.³²⁷ Even this more modest restriction, however, has not often been taken seriously by the courts; most such statutes, even those embracing rather ill-defined and broad-ranging delegations to administrative agencies, have been upheld.³²⁸

Again, the distinction between "filling the gaps" and "changing the standards" may prove useful.³²⁹ Even the earliest delegation doctrine cases acknowledged the propriety of permitting the executive branch to flesh out legislative mandates, especially where foreign policy was concerned.³³⁰ On the other hand, few, if any, provide a warrant for overtly departing from the starting points established by legislation.³³¹

³²⁶ *The Brig Aurora*, 11 US (7 Cranch) 382 (1813) (permissible for legislation to authorize the President to make certain factual findings as a predicate to the implementation of a national policy); *Wayman v Southard*, 23 US (10 Wheat) 1, 43 (1825) (permitting delegation of power to judges to develop necessary details in legislation); *Chadha*, 462 US at 985 (White dissenting); *Mistretta v United States*, 488 US 361 (1989) (upholding the broad, vague delegation of power to the Sentencing Commission).

³²⁷ *J.W. Hampton & Co. v United States*, 276 US 394, 409 (1928); *United States v Chicago, Milwaukee, St. Paul and Pacific RR Co.*, 282 US 311, 324 (1931); *Amalgamated Meat Cutters & Butcher Workmen v Connally*, 337 F Supp 737, 745-47 (D DC 1971).

³²⁸ See *Lichter v United States*, 334 US 742, 774-87 (1948); *Federal Radio Commission v Nelson Brothers Co.*, 289 US 266, 285 (1933); *Yakus v United States*, 321 US 414, 423-26 (1944); *National Cable Television Ass'n v United States*, 415 US 336, 342 (1974). Among the few exceptions to the general judicial tolerance of vague delegations were the New Deal cases of *Panama Refining Company v Ryan*, 293 US 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested [by Article I, § 1 of the Constitution]."); *A.L.A. Schechter Poultry Corp. v United States*, 295 US 495, 529-42 (1935), invalidating portions of the National Industrial Recovery Act. See also *Greene v McElroy*, 360 US 474 (1959); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L J 789, 809-16 (discussing the delegation doctrine in the context of legislative veto).

³²⁹ See *Chadha*, 462 US at 985 (White dissenting).

³³⁰ *Youngstown*, 343 US at 635-36 n 2 (Jackson concurring) (precedents elaborating exceptional presidential foreign affairs powers are mostly instances where Congress has added its own delegation to the President's inherent authority); *Chicago & Southern Air Lines, Inc. v Waterman Steamship Corp.*, 333 US 103, 109-10 (1948).

³³¹ *Hampton*, 276 US at 407-08; *Cincinnati, Wilmington, & Zanesville Rail Road Co. v Commissioners of Clinton County*, 1 Ohio St 77, 88-89 (1852); *State v Chicago, Milwaukee, & St. Paul Railway Co.*, 38 Minn 281, 298-300 (1888) (differentiating between a delegation

The conclusion, then, is that the types of delegation contained in recent arms control agreements would probably be upheld as constitutional—but only barely. The fact that the arrangement is efficient and practical—even cozy for the executive and the legislature—will not count for much if it exceeds constitutional parameters. The *Chadha* case indicates that the Founders' format can be stretched only so far, even where the extra-textual structure serves legitimate social ends.³³² There can be no constitutional principle permitting usurpations of the separation of powers simply on the assertion that the matters under consideration are merely "technical, administrative or procedural."³³³ There is still some life in the delegation doctrine, and Congress may not cede too much of its authority to the executive, especially where the anticipated provisions change, rather than merely augment, the original standards receiving advice and consent.

On the other hand, national security affairs are traditionally treated differently from most domestic fare, and the courts are particularly reluctant to upset an accommodation freely reached by the two political branches when confronting foreign sovereigns.³³⁴ Where the Senate has knowingly granted the modification

of legislative power—the ability to state what the substantive rules should be—and a more permissible allocation of discretion to interpret or enforce legislatively-crafted standards).

Under another common variation, Congress through legislation establishes an intended chain of actions, but also permits the President to waive implementation if specified criteria (potential damage to national security) are met. See 50 App USCA § 2410b (1991) (delegating power to waive otherwise automatic sanctions); Stephen Labaton, *Baker Defends Waiver of Sanctions Against Israel on Missiles*, NY Times A12 (Oct 28, 1991) (President Bush imposed sanctions on South African firm, but not on Israeli firm, for violating international agreement on non-proliferation of missile technology).

³³² See *Myers v United States*, 272 US 52, 293 (1926) (Brandeis dissenting) (the purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the departments, to save the people from autocracy").

³³³ *Panama Refining*, 293 US at 430 ("The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.").

³³⁴ The traditional balance of governmental powers is modified somewhat in foreign relations cases; the usual constitutional clash between states and the federal government, or between branches of the federal government, is evaluated differently when the United States confronts other sovereigns. See *Zemel v Rusk*, 381 US 1, 17 (1965); Mathews, 64 Yale L J at 350 (cited in note 278). The precise question of delegation of legislative powers, for example, may be evaluated differently in international, as opposed to entirely domestic, contexts. Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in Peter Raven-Hansen, ed, *First Use of Nuclear Weapons* 69, 83-86 (Greenwood, 1987); Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?*, in Raven-Hansen, ed, *First Use of Nuclear Weapons* 143, 147-55. But see Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L J

authority, and confined it in scope to certain types of detailed provisions, courts are unlikely to invalidate the mechanism.³³⁵ Delegations of legislative power that might offend the Constitution in the domestic arena are more tolerable in the foreign affairs milieu.³³⁶ In particular, the practice of executive agreements being authorized by an antecedent treaty has been firmly established in American law, even if the extension from "gap filling" to "standards changing" is novel. The route of informal treaty amendment, therefore, if not the policy rationales behind it, can probably withstand constitutional challenge.

C. Policy Analysis

On the other hand, this new process should not be carried too far. Even if the informal, non-legislative route to treaty modification could withstand constitutional scrutiny, "non-amendments" should not be used very often or very expansively. Three basic policy arguments support this conclusion.

First, the crucial distinction between "big" and "small" changes in a treaty regime, while superficially plausible, is ephemeral in practice.³³⁷ Administration spokespersons have searched for various verbal formulations to define the scope of the permissible changes, assuring Congress, in somewhat inconsistent vocabulary, that only "technical, administrative and procedural" provisions would prove malleable under these powers. Yet the negotiators themselves confirm that in arms control, as in other complex bargaining processes, the fine points are typically crucial. Behind an often facile agreement in principle, "the devil is in the details."³³⁸ Every lawyer knows that procedural questions can matter quite a

1255, 1284-85 (1988) (arguing that foreign affairs should not be treated so differently from domestic matters).

³³⁵ Justiciability issues, including standing, ripeness and the political question doctrine, have sometimes made it impossible to obtain judicial review of intensely political inter-branch controversies. See *Goldwater v Carter*, 444 US 996 (1979); *Chadha*, 462 US at 940-44. See also Koh, *The National Security Constitution* at 146-48 (cited in note 301) (courts continue to defer to the executive in foreign policy matters).

³³⁶ Henkin, *Foreign Affairs and the Constitution* at 118-20 (cited in note 297); Fisher, *Constitutional Conflicts* at 90-93 (cited in note 304). See also Note, 11 Hofstra L Rev at 815-18 (cited in note 280) (courts have upheld congressional-executive agreements against challenges claiming excessive delegation).

³³⁷ Compare with Mathews, 64 Yale L J at 373 (cited in note 278) (in attempting to distinguish international accords that could be presented as executive agreements from those which ought to be treaties, it would be impossible to operate any system that focused on whether the document in question was important or unimportant).

³³⁸ *Editorial on the Opening of the BWC Conference*, Berliner Zeitung (Sep 11, 1991) (details of operations of the BWC have proven the most problematic); 44 Cong Q Almanac

bit,³³⁹ and often the most critical, outcome-determinative variables are concealed in seemingly innocuous provisions of an arcane or boilerplate nature.³⁴⁰ The tumultuous ABM Treaty reinterpretation controversy, after all, arose essentially from varying views about the meaning of three ordinary words in the treaty's definition-of-terms article.³⁴¹

Admittedly, some provisions of a treaty will matter more than others, and for any particular agreement, there may even be widespread consensus about which points are truly the most central to national security. But this notion of distinguishing between treaty clauses based upon their relative importance produces only an imprecise, shifting allocation. Language that seems trivial to some may be problematic to others. Points that were overlooked once may come back to haunt us later. Even the distinction between "gap filling" and "standards changing" is unreliable, subject to differences of view and amenable to evasion by clever wordsmiths.

Moreover, the provisions that are under scrutiny here are hardly so trivial as to pass serenely among the flotsam of international traffic. The 1989 INF Treaty Memorandum of Agreement, for example, was negotiated over a period of eighteen months, by a delegation of a dozen or more United States officials. Its drafting engaged the energies of diplomats, technical experts, and lawyers and it was deemed important enough to sustain the attention of senior leaders in the SVC, who thought that they were developing a great many provisions that were necessary to sustain the treaty as a practical, viable agreement.³⁴² If the MOA and its counter-

385 (1988) (American INF Treaty negotiator reported that ninety-seven points in the draft treaty text were resolved in the last few days prior to the signing summit meeting).

³³⁹ *Guaranty Trust Co. v. York*, 326 US 99, 107-08 (1945) (distinction between substantive and procedural points is elusive in undertaking an *Erie* analysis; either type of issue may be outcome-determinative).

³⁴⁰ See John Edward Murray, Jr., *On Contracts* § 97 (Michie, 3d ed 1990); Donald M. Zupanec, *Doctrine of Unconscionability as Applied to Insurance Contracts*, 86 ALR3d 862 (1978) (obscure, legalistic language in standard form contracts may unfairly take advantage of customer, permitting assertion of unconscionability defense).

³⁴¹ The treaty provides that

For purposes of this Treaty, an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of [ABM interceptor missiles, ABM launchers, and ABM radars].

ABM Treaty, Art II (cited in note 1). The Reagan Administration's interpretation would have read the words "currently consisting of" as if they had been "and which consist of," thereby transforming an *illustrative* definition into a *limiting* one. Chayes and Chayes, 99 Harv L Rev at 1958 (cited in note 2).

³⁴² Look Interview (cited in note 145); 1990 ASIL Proceedings at 411 (cited in note 145) (comments of George Look).

parts are important enough to justify that kind of time and energy by the foreign affairs and arms control establishments of the United States and other governments, then surely they are important enough to steal a bit of congressional attention, too.

Similarly, in the Open Skies Treaty, many of the issues that are to be amenable to non-amendment modification—the assignment of national quotas of overflights, the types of sensors to be carried aboard the inspecting aircraft, and the dissemination of the acquired data—were among the most controversial issues in the treaty negotiations. They were the questions that the national diplomats cared a great deal about and devoted considerable negotiating energies toward resolving; presumably they could be matters of interest to legislators, too.³⁴³

Calling a provision technical, administrative or procedural, therefore, is inadequate to withdraw it from effective legislative oversight. That slope is too slippery. The treaty's delegation of power from Congress to the President should be constrained more tightly.

Second, the non-amendment proposition is unreliable because it depends too heavily upon the promise (or the illusion) of executive-legislative harmony and cooperation. Administration spokespersons have affirmed that "we are going to have to work with the Congress" and that this practical imperative of future collaboration will drive the executive, as a prudential matter, to confine the informal modification process to a narrow range of applications.³⁴⁴

Again, there is some surface plausibility to this argument. Both the executive and the legislature have a powerful, shared interest in promoting national security and global stability, and we would certainly hope for a high degree of consensus and cooperation in the development and execution of the most sensitive aspects of United States foreign policy. But it is absurd to overlook the fact that arms control has become immensely controversial in the modern era, and it is foolhardy to construct a policy edifice around the wishful hypothesis that the contending factions will suddenly and permanently close ranks.³⁴⁵

In fact, when we scrutinize even the first few illustrations of executive agreement alterations available under these recent trea-

³⁴³ Open Skies Treaty, Art X, § 5 (cited in note 105); Amy E. Smithson, *Open Skies Ready for Takeoff*, 48 Bull Atomic Scientists 17 (Jan/Feb 1992).

³⁴⁴ See text accompanying note 156 (quoting INF Treaty negotiator Glitman).

³⁴⁵ Koh, *The National Security Constitution* at 40-45 (cited in note 301) (summarizing legislative-executive battles over the treaty power).

ties, we must juxtapose (1) the administration's September 14, 1990 written assurances to the Senate, in the context of the 1990 TTBT/PNET protocols, that the Congress would be advised "prior to such modifications or changes becoming binding on the Parties";³⁴⁶ and (2) the administration's signature, for immediate entry into force, of two amendments to the INF Treaty MOA on April 4, 1991, where the Senate was neither advised of the documents or their contents nor offered opportunities for briefings, until after the accords had already been effectuated.³⁴⁷ Certainly the contexts of the two cases were different, and nothing crucial to arms control policy has been lost in the shuffle, but the overall effect has undoubtedly been to frustrate the legitimate congressional interest in hearing about, and participating in, nascent changes in disarmament treaties before they become moot. Without accusing anyone of bad faith or attempting to "slip something past" Congress, this initial record amply demonstrates the Constitution's wisdom in insisting upon regular, formal procedures rather than casual verbal assurances.

In this context, the ABM Treaty reinterpretation controversy is hardly an anomaly. It represents, rather, the predictable tension between the executive branch, increasingly interested in asserting the power to "bend" treaties,³⁴⁸ if not to break them, and the legislature, which ought to be sensitive to the maintenance of its institutional perquisites. The Constitution's separation of powers, however, relies upon tensions between those two competing units, and disarmament policy should not attempt, or hope, to squelch it.³⁴⁹

Finally, the proposition favoring informal treaty modification is unwise because in the long run, it is in all parties' interests to confront arms control problems openly and to deal with potential controversies, even minor ones, prospectively and directly. Disarmament continues to be an intensely "hot" political topic; every aspect has the potential to become a *cause celebre*. Where nothing can be truly finessed, it is better to deal with each issue overtly and to accept the accompanying political lumps.

From the perspective of Congress, staying "in the loop" in foreign policy matters is essential. These non-amendment delegations

³⁴⁶ See text accompanying note 201.

³⁴⁷ See text accompanying notes 178-83.

³⁴⁸ Koh, *The National Security Constitution* at 43 (cited in note 301).

³⁴⁹ Henkin, *Foreign Affairs and the Constitution* at 90 (cited in note 297) ("In principle as in fact, recurrent competition for power has punctuated relations between President and Congress, throwing up the dominant, least-tractable constitutional issues of American foreign relations.").

to the executive may seem to have some immediate value, in conserving precious congressional time for more prominent issues, but no one can accurately predict which currently latent problems will emerge as critical in the future. A foreign alliance may prove to be "entangling" in ways we cannot easily foresee, and Congress must stay current with—or ahead of—the evolving obligations. Arms control in particular is so important to national life that the Congress must drive itself to stay fully engaged, even in the minutiae.³⁵⁰

From the perspective of the presidency, too, it is better to have Congress informed and on board at the outset, even at the price of occasional political perturbations. If an issue is truly inconsequential, then the process of securing explicit, contemporaneous legislative endorsement should not prove an insurmountable hurdle. Conversely, if, using the asserted non-amendment process, the executive does succeed in slipping some potentially nettlesome issue past Congress without the public attention that a more formal process would entail, any executive celebrations might prove to be short-lived. If controversy ever does erupt over that issue, the executive will not get much mileage or satisfaction out of the argument that "the Congress had an implicit opportunity to object long ago, but failed to do so."³⁵¹ In short, if there is to be a political maelstrom, or even a minor tempest, between Congress and the President over an issue of arms control, the sound practice is to get it over with sooner rather than later.

V. A RANGE OF SOLUTIONS

If the current non-amendment routine is therefore legally or politically defective, what other avenues exist, or could be created, for dealing with the newly salient problems of treaty complexity and detail? As each new agreement makes arms control an ever more exacting science, additional mechanisms for effective drafting and implementation will have to evolve. There really is a problem generated by overly precise disarmament accords, and some practi-

³⁵⁰ See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Va L Rev 1253, 1260 (1988) (one of the purposes of the separation of powers is to ensure political accountability of Congress); Koh, 97 Yale L J at 1323-25 (cited in note 334) (supporting adversarial review of executive initiatives).

³⁵¹ See Comment, *Illumination or Elimination of the 'Zone of Twilight'? Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U Cin L Rev 95 (1982), and Koh, *The National Security Constitution* at 142-43 (cited in note 301) (critiquing judicial interpretations that construe congressional silence or inaction as constituting legislative approval of the executive's policies).

cal accommodation of the competing interests must therefore be developed.

The current administration has suggested that Congress and the executive together face an unfortunate but unavoidable Hobson's choice: either the Senate, in approving a new treaty, cedes this essentially unregulated power to the executive to bend the treaty regime in all sorts of unpredictable ways, or else the Senate, insisting on traditional maintenance of the formal treaty amendment procedures, bogs the legislative process down in repeated, picayune examination of multiple implementing accords of interest to no one. If those were, in fact, the only alternatives—if Congress had to elect between sacrifice of its constitutional role or burial in petty details—the separation of powers would fare poorly indeed. In reality, however, a far broader range of possible recourse is available, and this section outlines some of the possibilities. No one of these alternatives, by itself, will suffice for all circumstances, and there may be some overlap and conflict among them in particular applications. Nonetheless, together they do provide a spectrum of possibilities, expanding the repertoire of replies to the current challenges.

A. Reformatting Arms Control

One obvious potential reaction is to cut the center out of the problem by dramatically changing the style of future disarmament accords. Instead of trying to pack so much detail and precision into each arms control treaty, the negotiators could construct simpler, smaller agreements, affording more frequent occasions for congressional participation in the arms control process. Arms control treaties might again become shorter, more general statements of official policy, with the minutiae deferred for resolution in diplomatic practice. Congress would be kept closely informed through the mechanism of additional advice and consent votes on subsequent agreements, whether they be cast as "gap fillers" or changes in the original substantive standards.

To some extent, the model for this approach could be the annual congressional budgeting process. While the yearly wrangling over authorizations and appropriations for a typical government agency is hardly a paradigm of legislative efficiency or aplomb,³⁵² it

³⁵² See Lawrence J. Haas, *New Rules of the Game*, 22 Natl J 2793 (Nov 17, 1990) (annual budgeting process is cumbersome and difficult; Congress sometimes attempts counterproductive intrusions into the details of executive programs).

does offer certain relevant advantages. Through this process, Congress is able to insert itself into the details of agency spending, assuring adequate oversight of administration projections. At the same time, this process provides a degree of flexibility, so that the bureaucracy can adapt to unforeseen contingencies during the fiscal year. As part of the subsequent year's budget cycle, Congress reviews the intervening events, inserts into the law any corrections it insists upon, and again approves the agency's future plans. The close attention provided by this perpetual review ensures that there will not be too great a disjunction between executive discretion and congressional approval.³⁵³ The process also helps make any particular year's budget cycle seem less cataclysmic. Everyone knows that programs approved or rejected this year will again be up for grabs next year, unlike the traditional "all or nothing" tenor of current arms control treaties.³⁵⁴ Arms control, too, would benefit if it were converted into more of a routine, ongoing process, less dependent upon the occasional "spectacular event."³⁵⁵

Packaging arms control into smaller, more frequent units has other advantages as well. It would help the diplomats catch up with the weapons designers: traditionally, arms control has too often been overtaken by events in the laboratories and test ranges, where the development of new generations of ordnance has outstripped the negotiations. More frequent, albeit partial, treaties may help establish at least a limited control regime before a weap-

³⁵³ Louis Fisher, *Presidential Spending Power* 75-80 (Princeton, 1975) (informal controls on reprogramming authorized funds allow the executive branch some flexibility in spending, while "keeping faith" with the Congress). One perceived danger of any closer congressional participation in the arms control process would be the tendency for the legislature to attempt to "micromanage" foreign affairs, unduly constraining the executive branch. Providing closer oversight, however, would not necessarily exacerbate any such tendencies; Congress has been increasingly active in international matters in recent years, and many observers have considered the participation beneficial. Thomas M. Franck, *Human Rights and Constitutional Wrongs: A Case Study of the Origins of Congressional Imperialism*, in Franck, ed, *The Tethered Presidency* 153 (NYU, 1981).

³⁵⁴ The United States's decision about resuming the production of chemical weapons, for example, was intensely controversial, and was fought out annually in the congressional authorization and appropriations process throughout the 1980s. Blaine Harden, *The Gassing of Washington*, *The Washingtonian* 125 (Feb 1984). However, when the Chemical Weapons Convention (cited in note 35), is finalized, it will be the subject of a single congressional approval process, initiating or rejecting a commitment that will be binding for years. In general, it should be easier for Congress and the public to deal with, and to make wise decisions about, documents containing shorter time frames and reviewable arrangements.

³⁵⁵ Einhorn, 32 *Survival* 497 (cited in note 70); Ken Adelman, *Breaking the Arms Control Mode*, *Wash Times* F1 (Oct 1, 1991). See also Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End is Achieved, 83 *Am J Intl L* 718, 725-27 (1989) (value of close consultation between legislature and executive throughout the treaty process).

ons program develops sufficient political momentum to escape later, more comprehensive, efforts at regulation.³⁵⁶ Concentrating on smaller packages might also help arms control escape the adverse effects of "linkage," the political process that has too often distorted the disarmament process, converting each major treaty into a virtual referendum on all other aspects of the U.S.-Soviet relationship or internal Commonwealth or Russian affairs.³⁵⁷

Some might argue that such partial measures would be ineffective, because they serve merely to divert incipient arms races into other, less-regulated and possibly more dangerous avenues. (The traditional metaphor likens the arms control process to squeezing a balloon—if one portion of the subject is crimped, the unrelieved pressures will simply be diverted, causing another region to swell up unnaturally.) However, this comprehensiveness argument has lost much of its appeal recently. Modern arms control agreements, despite years of painstaking negotiations, cannot hope to incorporate everything that might be relevant to even a single issue. For example, limitations on medium-range nuclear systems have important implications for tactical-range weapons, too, yet they are not wedded into a single pact.³⁵⁸ Likewise, agreement on constraints on offensive arms would also reasonably affect negotiations on defenses, yet they remain separate treaties.³⁵⁹ The overlaps between chemical and biological arms are similarly manifest, yet they have long been the subjects of different negotiations.³⁶⁰ So

³⁵⁶ See Arms Control and Disarmament Act Amendments, Hearings before Subcommittee on International Security and Scientific Affairs of House Committee on International Relations, 94th Cong, 1st Sess 60-62 (Apr 8 & 10, 1975) (statement of Representative Harrington); Nancy-Ann E. Min, *Toward More Intelligent National Security Policy Making: The Case for Reform of Arms Control Impact Statements*, 54 Geo Wash L Rev 174, 239-40 (1986) (in creating a system of "arms control impact statements," Congress sought to obtain better information about nascent weapons systems early in the development process, where controls might be substantively more important and politically more feasible).

³⁵⁷ Einhorn, 32 Survival 497 (cited in note 70).

³⁵⁸ The INF Treaty dealt with weapons of intermediate range (i.e., between 500 and 5,500 kilometers). INF Treaty, Art II, §§ 5, 6 (cited in note 28). Even though many people were concerned about the omission of the shortest range nuclear arms, that problem was deferred for subsequent consideration. *Short-Range Nuclear Forces*, Arms Control Rptr 408.A.1 (Jan 1991).

³⁵⁹ The SALT I talks addressed both offensive and defensive systems within a single negotiation, although two separate agreements were produced. *ACDA Treaty Book* at 152-53 (cited in note 5). Since that time, the SALT II and START negotiations have concerned exclusively the offenses, uncoupled from further elaboration of defensive questions. *Space Weapons*, Arms Control Rptr at 575.A.1 (cited in note 217).

³⁶⁰ The Geneva Protocol applied to both chemical and biological weapons, and most subsequent efforts to enhance the international regulations also addressed both issues. Beginning in the 1970s, however, the two topics have increasingly been differentiated, with the

the notion of splitting arms control into more digestible packages is not such a radical departure from existing practices.

Moreover, even the signing of a major arms control treaty is hardly the end of the process these days. Experience with the INF, START, CFE, and Open Skies treaties demonstrates that substantial post-signature negotiations will continue, resolving important issues prior to ratification.³⁶¹ Even after that, the various implementation bodies are set to work, elaborating the text and providing essential operational mechanics.³⁶² We have thus backed into a situation where arms control is already proceeding in "dribs and drabs," and formal conclusion of any particular treaty is no longer the watershed event it used to be.³⁶³ Perhaps the time has now come to take advantage of this inevitability by recharacterizing what we expect a treaty to look like.³⁶⁴

Some of these smaller, less climactic treaties may also be made explicitly temporary in character.³⁶⁵ The SALT I Interim Agreement looks pretty good these days, as a supposedly partial and limited five-year measure that was designed merely to "freeze" the status quo, pending the conclusion of a more powerful, extended-duration successor. The Interim Agreement, however, survived

BWC addressing only biological arms and the CWC targeting solely the chemicals. *ACDA Treaty Book* at 129-32 (cited in note 5).

³⁶¹ 1990 ASIL Proceedings at 411 (cited in note 145) (comments of George Look). See text accompanying note 154 (extensive U.S.-Soviet post-signature negotiations regarding INF Treaty); text accompanying note 207 (comparable activity concerning the CFE Treaty); and note 215 (same for Open Skies Treaty).

³⁶² See text accompanying notes 134-42 (describing the mandates and functioning of the several implementation bodies under modern arms control treaties).

³⁶³ Even before the CFE Treaty was ratified, the parties initiated talks on two follow-on accords. The "CFE IA" negotiations are aimed at reducing the number of each side's armed personnel (complementing CFE I's attention to military equipment), and at instituting a program of aerial inspection. The "CFE II" talks would work toward deeper reductions in the permissible weapons levels. *Further Conventional Reductions in Europe—CFE IA and CFE II*, Arms Control Rptr 410.A.1 (Jan 1991).

³⁶⁴ One important sub-issue in this respect concerns the structure of the various treaty documents. To date, the standard practice has been for most or all of the technical annexes, inspection protocols, and similar documents to be considered "integral" to the treaty. See SALT II Treaty, Protocol, Art IV (cited in note 25); INF Treaty, Art I (cited in note 28). This formality entrenches the appendices more deeply, making modification more difficult. A document that was not "integral" in this way might permit easier revision.

³⁶⁵ The intended duration of an agreement has been a major factor in assessing whether it should be submitted to the Congress as a treaty or an executive agreement. During SALT I, partisans in both the Senate and House of Representatives focussed on the distinction between the ABM Treaty (cited in note 1), which was of unlimited duration, and the SALT I Interim Agreement (cited in note 14), which had a term of five years. Comment, 38 UCLA L Rev at 1577-80 (cited in note 278). Conceivably, many of the non-amendments under consideration in this Article might themselves be "temporary," subject to further modification as experience develops.

much longer, and had a more enduring stabilizing effect, than its modest origins would have indicated.³⁶⁶

Would Congress tolerate this new approach? Would partisans on both sides of the aisle back away from the preternatural inclination toward comprehensiveness and over-specificity in treaty language? Would the congressional leadership be able to deliver on any commitments about legislative self-restraint in the evaluation of a more streamlined treaty? It is difficult to be optimistic about any proposal calling for less stringency in treaty drafting, but perhaps the political moment can be seized. No one can be happy with the current logjam, and neither the executive nor the legislature can be entirely comfortable with the excessive delegations that recent treaties have adopted. Perhaps, therefore, a more modest approach may have some appeal, at least on some occasions.

Overall, the strategy here (and relevant to many of the Article's subsequent suggestions, as well) is for the executive branch to look upon Congress more as an ally, not as an antagonist, in the creation of United States disarmament policy. Too much in the recent exchanges has suggested that the executive branch views the legislature as only an impediment, a problem to surmount or evade in order to craft and implement national security programs.³⁶⁷ Some of this tension may be inevitable so long as opposite political parties control the two branches, and some of it is inherent in the separation of powers, but the hostility need not be exacerbated. As discussed above,³⁶⁸ the constitutional scheme enforces some automatic antagonisms between the branches, but especially in foreign affairs, the legislature and the executive can do more to close ranks and collaborate.³⁶⁹ Sharing the powers as the Constitution intended,³⁷⁰ rather than asking either body to abdicate, will allow

³⁶⁶ ACDA Treaty Book at 167-68 (cited in note 5).

³⁶⁷ Louis Fisher, *Understanding the Role of Congress in Foreign Policy*, 11 Geo Mason U L Rev 153, 160-61 (1988); Patsy T. Mink, *Institutional Perspective: Misunderstandings, Myths, and Misperceptions: How Congress and the State Department See Each Other*, in Franck, ed, *The Tethered Presidency* 64 (cited in note 353).

³⁶⁸ See text accompanying notes 303-14.

³⁶⁹ Bestor, *Am J Intl L* at 727 (cited in note 355).

³⁷⁰ See Koh, *The National Security Constitution* at 69 (cited in note 301) (Constitution requires balanced institutional participation). But see Lawrence J. Block, Lee A. Casey, and David B. Rivkin, *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U Pa L Rev 1481, 1482-83 (1989) (arguing that the Constitution does not provide for shared or blended powers; rather there are distinct legislative and executive functions, with the overall treaty power being "mixed").

proponents on both sides to participate in a more reasoned, more coherent, and ultimately more successful foreign policy.³⁷¹

B. Use of Congressional-Executive Agreements under Section 33

As noted above, the Arms Control and Disarmament Act specifies that "sole" executive agreements should not be utilized to construct arms reduction arrangements.³⁷² Although this legislation is of questionable constitutionality,³⁷³ it does represent a powerful statement of congressional concern and a desire to stay intimately involved in shaping any American "entangling alliances" in the disarmament field. Section 33 should therefore be read as a permanent limitation on any delegation of powers contained in a treaty; non-amendment changes cannot be used to create new substantive obligations requiring the United States "to reduce or to limit" its armaments. A court construing the two instruments (the earlier statute and any subsequent treaty) will attempt to apply both,³⁷⁴ confining any authority over unilateral "viability and effectiveness" changes to a relatively narrow, secondary scope. Especially where the executive has pledged that the future modifications would be technical, administrative, and procedural rather than substantive, the option to rely upon an additional congressional vote should be implemented in any close cases.

A standard mechanism in the future, therefore, could be the negotiation of a basic "framework" treaty, to be effectuated pursuant to a two-thirds vote of advice and consent in the Senate, followed by a series of smaller implementing accords, each of which would require a majority vote in each house. That sequence would be especially appropriate where the new document purported to vary, rather than merely to supplement, the original terms of the framework. This procedure would dispense with the formal route

³⁷¹ See Ronald A. Lehmann, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 Yale L J 885, 887 (1989) (arguing that excessive tensions between Congress and the President undercut the United States' ability to function effectively in dealings with other states).

³⁷² See text accompanying notes 65-67.

³⁷³ Arguably, the legislation could be construed as not intending to constrain those executive agreements which derive from the President's inherent constitutional powers; these could therefore still be effectuated as sole executive agreements. Restatement at §303, Reporters' Note 7 (cited in note 47).

³⁷⁴ Id at § 114; *United States v The Palestine Liberation Organization*, 695 F Supp 1456 (S D NY 1988).

of treaty amendment, but would still keep Congress as an active participant.³⁷⁵

The reliance on a majority vote in each house would have salutary effects for arms control.³⁷⁶ Dodging the requirement for repeated two-thirds votes in the upper chamber is itself an important efficiency-promoting ploy, and it eases somewhat the political concern about "going to the well too often."³⁷⁷ While there are certainly burdens associated with keeping both houses, rather than simply the Senate, informed about arms control details—more briefings, more hearings, more votes to shepherd—it could be managed and it would likely prove a smaller political burden than the formal amendment route.³⁷⁸

There is, to be sure, a meaningful concern about the delays and disruptions inherent in any legislative process. The task of securing congressional approval can take months—even when the true military significance of a treaty is marginal—postponing entry into force. Sometimes the delay, and the attendant possibility that the Congress might effectively insist on changes, can be troublesome.³⁷⁹ Yet this problem may be overstated, as the INF Treaty example illustrates. How big a cost was the additional six months attributed to the legislative process in that instance, when the treaty negotiations themselves had consumed seven years? More-

³⁷⁵ See Henkin, *Foreign Affairs and the Constitution* at 134 (cited in note 297) (Senate consented to a treaty establishing a generally applicable arbitration procedure, but attached a condition specifying that a separate Senate consent was necessary prior to the submission of any particular case in which those procedures would be invoked).

³⁷⁶ See Comment, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 Harv Intl L J 421 (1980) (arguing that future strategic arms limitation accords should be cast as executive agreements approved by joint resolution of Congress, rather than as treaties).

³⁷⁷ Scholars have critiqued the constitutional requirement for a Senate super-majority in approving treaties, and have called for greater reliance upon executive agreements in which each house would consider the treaty by simple majority vote. Covey T. Oliver, *Getting the Senators to Accept the Reference of Treaties to Both Houses for Approval by Simple Majority*, 74 Am J Intl L 142 (1980); Phillip R. Trimble, *Foreign Affairs Law and Democracy*, 89 Mich L Rev 1371 (1991).

³⁷⁸ A plan calling for increased reliance upon executive agreements would also have to confront severe intra-Congress political squabbling. The Senate has traditionally insisted that important arms control agreements be submitted in treaty form, underscoring the upper chamber's special constitutional role. The House, meanwhile, has favored executive agreements, where both chambers participate. In the case of the SALT II Treaty, disagreement over this procedural question threatened to derail substantive consideration of the merits of the document. Comment, 38 UCLA L Rev at 1582-85 (cited in note 278). See also Rovine, 52 Ind L J at 420-21 (cited in note 294); Note, 11 Hofstra L Rev at 836-37 (cited in note 280).

³⁷⁹ Koh, *the National Security Constitution* at 121-22 (cited in note 301) (occasional need for President to act precipitously in international affairs).

over, when the preparation of the subsequent MOA unexpectedly required some eighteen months after the treaty entered into force, would it have been unacceptable to defer the process a bit further to accommodate legislative voting?³⁸⁰ When the executive branch portion of the arms control process stretches out so far, it is unseemly to blame Congress for intolerable delays or to cite the urgency of the documents as a rationale for excluding legislative oversight altogether.

C. Use Non-binding "Political Commitments"

There is a natural skepticism about arms control negotiations that do not result in legally-enforceable documents, so-called non-binding "political commitments." As noted, their reliability and even their exact contents may be questioned, as well as their lawfulness under Section 33.³⁸¹ Nonetheless, they do have a role to play in national security deliberations, and arms control history has demonstrated their utility.³⁸²

For example, prior to signature, many arms control accords have benefitted from a "negotiators' pause" in the pace of weapons programs, as non-binding statements of policy allowed the bargaining process to take place in an environment free from additional pressures. The Limited Test Ban Treaty provides a conspicuous example, as that long-sought agreement finally arose only after a series of unilateral and parallel moratoria on nuclear explosions.³⁸³ Similarly, in the interval between signing and ratifying an arms

³⁸⁰ Congressional delays would have been particularly manageable in the INF Treaty context, since the key implementing measures were already being applied, on an interim basis, during the pendency of the MOA negotiations. See note 166. The parties could easily have agreed to prolong their informal adherence to those measures still further, not losing any verification rights, while Congress evaluated the signed MOA before allowing it to enter into force formally.

³⁸¹ See text accompanying notes 120-32. A period of state transition or trauma, such as the 1991 coup attempt in the U.S.S.R. or the subsequent secession of republics, is perhaps the time when "politically binding" agreements are least reliable, and when insistence on the formalities of legally binding instruments is most important.

³⁸² See Squassoni, *Workshop Report: The Future of Arms Control* at 15-16 (cited in note 71) (informal, unilateral arms control may play larger role than treaties in the future); Glennon, 71 *Am J Intl L* at 268-72 (cited in note 122) (distinguishing international agreements from non-binding statements of intention as tools of arms control); Adelman, *Wash Times F1* (cited in note 355) (noting that in the 1930s, Winston Churchill advocated informal non-binding approach, rather than formal negotiations, for pursuing disarmament).

³⁸³ The United States, Soviet Union, and United Kingdom each declared various testing moratoria during 1958-61, prior to the conclusion of the binding treaty. *ACDA Treaty Book* at 40-41 (cited in note 5). The Biological Weapons Convention, too, was preceded by unilateral United States declarations renouncing biological weapons and dismantling the American inventory. *Id.* at 130-31.

treaty, mutual (but not legally binding) pledges of a "standstill" in the relevant weapons programs may be important, as the SALT I example suggests.³⁸⁴ Even an administration opposed to a particular arms control agreement that it has inherited from its predecessor may find advantage in at least temporarily sustaining it, through revocable verbal undertakings, pending the development of a more satisfactory substitute.³⁸⁵ Most recently, the exchange of parallel unilateral statements of national intentions has proven an effective means for the United States and the Soviet Union to lurch forward with arms control proposals, unencumbered by the niceties and the delays of the negotiations process.³⁸⁶

For all the attendant dangers of vagueness and revocability, exploitation of non-binding statements such as these can afford the parties an opportunity to pursue common goals expeditiously, even where they cannot yet agree on the exact wording of the prohibitions or the precise content of the verification arrangements. They can escape the interstices of the lawyering process, and cut immediately to the most critical elements, leaving the detail work for later. Sometimes, these political statements may prove ephemeral, as the apparent consensus dissolves in dissonance over the details.³⁸⁷ But more often they will permit the parties to align their

³⁸⁴ The United States and the Soviet Union both stated that they would observe the obligations of the SALT I Interim Agreement and the ABM Treaty from the date of signature, not delaying all application until formal entry into force. ABM Treaty, Common Understanding E (cited in note 1); SALT I, Interim Agreement, Common Understanding C (cited in note 14).

³⁸⁵ *ACDA Treaty Book* at 263 (cited in note 5) (Reagan Administration honored SALT Agreements).

³⁸⁶ Andrew Rosenthal, *U.S. to Give Up Short-Range Nuclear Arms: Bush Seeks Soviet Cuts and Further Talks*, *NY Times* 1 (Sep 28, 1991). Another related strategy is illustrated by the September 23, 1989 United States-Soviet Union talks on chemical weapons. During their meetings at Jackson Hole, Wyoming, Secretary of State James A. Baker III and Foreign Minister Eduard Shevardnadze signed a memorandum of understanding that incorporated agreement on the conduct of certain cooperative verification experiments and the exchange of sensitive data. This document was effective upon signature. It escaped the operation of § 33 because it was merely a prelude to a chemical weapons dismantling agreement; it did not itself contain any substantive reductions or limitations. Memorandum of Understanding Between the Government of the Union of Soviet Socialist Republics and the Government of the United States of America, Agreement Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons, Sep 23, 1989, 28 *ILM* 1438-43.

³⁸⁷ See Robert A. Divine, *Early Record on Test Moratoriums*, 42 *Bull Atomic Scientists* 24 (May 1986) (non-binding statements by Eisenhower and Khrushchev during the 1950s contributed to the negotiation of the LTBT, but were themselves a source of uncertainty and controversy between the United States and the Soviet Union).

policies satisfactorily over a sustained period of time,³⁸⁸ even where the pettifogging details would escape their management. Moreover, the process does preserve a type of legislative check: if Congress disapproves of a particular political statement, or wishes to challenge the regime created thereby, it could do so directly through ordinary legislation, overriding the articulated policy.³⁸⁹

The strategy of "provisional application" of the terms of a new agreement or a subsequent non-amendment could also routinely play a role here. That is, negotiators could agree to implement at least some of the key clauses of an agreement, even prior to formal entry into force. This process still accords the legislature a full opportunity to vote on the document (and may, in fact, further educate the voters, by providing at least some initial operating experience with the functioning of the accord). At the same time, it obviates the worst dangers of delay by providing that the agreement or the modification may be implemented swiftly.

D. Use the "Fast Track" Process

Another intriguing model of expedited treaty implementation has been provided by certain recent agreements in the field of international commerce and trade. There, Congress upon occasion has accorded the executive extraordinary authority to rely upon a "fast track" approval procedure. Under this process, each house commits itself to consider the negotiated agreement on a very quick timetable, with any potential amendments being ruled out of order, and with a definitive "up or down" vote on the negotiated text.³⁹⁰

Fast track authority has been extended in the case of the General Agreement on Tariffs and Trade (GATT) "Uruguay round" of negotiations,³⁹¹ and for the documents pursuing a "North Ameri-

³⁸⁸ As the TTBT and PNET examples suggest, informal statements of intention to abide by a signed treaty while its ratification is pending can prove quite durable. American and Soviet political statements sustained those treaties for sixteen and fourteen years, respectively, prior to their entry into force. See text accompanying notes 37-39.

³⁸⁹ Ordinary legislation supersedes any inconsistent international agreement as a matter of United States law, provided that the Congress is clear about its intention to create such a conflict. *Palestine Liberation Organization*, 695 F Supp at 1464; Restatement at § 115 (cited in note 47).

³⁹⁰ See Trade Act of 1974, 19 USC §§ 2191-93 (1982); Trade and Tariff Act of 1984, 19 USC § 2112(b)(4) (Supp III 1985); 1988 Omnibus Trade and Competitiveness Act, 19 USC § 2903 (1988). See also War Powers Resolution, 50 USC § 1545 (1992) (establishing priority procedures for consideration of joint resolution regarding use of force).

³⁹¹ These negotiations would comprehensively address tariffs and other barriers to trade around the world on a wide range of commercial products and services. Over 100 coun-

can free trade zone" incorporating the United States, Canada, and Mexico,³⁹² as well as in a few other instances.³⁹³ Proponents have asserted that this unusual procedure is warranted in the trade area due to the complexity of the subject matter, the urgency of securing quick legislative approval, and, especially, the danger that congressional meddling would upset the delicately-balanced result of a complex, multi-party bargaining process that incorporated so many trade-offs and asymmetrical exchanges that a legislature's attempts to fiddle with any details could cause the entire package to unravel.³⁹⁴

These seem like compelling rationales, and Congress has grudgingly accommodated them.³⁹⁵ Many of the same arguments apply, sometimes with even heightened vigor, in the case of arms control. The complexity of the subject has readily been admitted, as well as its urgency. Multilateral arms control, moreover, is at least as delicate as multilateral trade regulation—in each case there could be an unacceptable danger of any one country making post-signature attempts (inspired by its national legislature or elsewhere) to re-balance the negotiated terms. If one state's legislature attempts to grab more than its diplomats could wrangle for it, then others will surely be inspired to duplicate the effort, causing the text, and the entire project, to fall. There is, in sum, no logical argument that the fast track authority must be confined to the trade sector.

The fast track procedure in any context is not free from cost or controversy.³⁹⁶ It shortens the time available to the congressional committees and it restricts the range of vehicles available for Congress to effectuate any policies more subtle than a simple

tries have participated since 1986. *International Trade Agreements: Fast Track Procedures* (Mar 1, 1991 report to Congress, submitted by President Bush), reprinted in 1 For Pol Bull 59-60 (May/Jun 1991).

³⁹² The free trade agreement would integrate the economies of the three countries to a much greater degree, encompassing approximately 360 million people and almost \$6 trillion in annual output. *Id.* at 60.

³⁹³ Fast track procedures were used with success in the Tokyo GATT round in 1979, the 1985 free trade agreement with Israel, and the 1988 free trade agreement with Canada. *Id.* at 59.

³⁹⁴ *Id.*; Jeffrey J. Schott, *North American Free Trade and US Economic Interests*, Statement before Subcommittee for Western Hemisphere and Peace Corps Affairs, Senate Foreign Relations Committee, 12 (Mar 22, 1991) (on file with U Chi L Rev).

³⁹⁵ See Koh, *The National Security Constitution* at 176-78 (cited in note 301).

³⁹⁶ David S. Cloud, *Bush's 'Action Plan' May Be Key To Approval of Fast Track*, Cong Q 1120 (May 4, 1991) (intense political debate surrounded the proposals to extend fast track authority).

"yea" or "nay."³⁹⁷ But it does satisfy the demands of bicameralism and presentment,³⁹⁸ preserving a sufficient role for the legislature in the treaty-making process,³⁹⁹ and it could well be adapted to the demands of arms control.

In the arms control context, fast track authority could be tightly defined.⁴⁰⁰ Most appropriately, it would apply not to the original comprehensive treaty, as in the GATT example, but to the detailed subsequent measures of implementation. The Congress could commit itself, by statute or by internal rules within each chamber, to review these later gap-filling or standards-changing modifications on an expedited, businesslike calendar, declining to tinker in the interstices that the executive had negotiated.

In contrast to the most recent accords, therefore, future arms control treaties could in this vein specify that any subsequent changes, including merely technical "viability and effectiveness" details, *would* be deemed to be amendments to the treaty, requiring legislative approval prior to entry into force. At the same time, however, the original Senate resolution of ratification of the treaty would also contain a congressional commitment to review any such implementing details according to a suitable timetable negotiated between the executive and the legislature. This process could involve both houses, or just the Senate, but in either event it would be crafted to ensure that the implementing agreements received the most expeditious treatment.⁴⁰¹ The other parties to the treaty, however, would not be involved in the American decisionmaking

³⁹⁷ Schott, *North American Free Trade* at 13-14 (cited in note 394) (Congress still retains the right to participate fully in evaluating the negotiated treaty).

³⁹⁸ Stephen Breyer, *The Legislative Veto After Chadha*, 72 *Georgetown L J* 785, 793-94 (1984) (arguing for a fast track procedure to replace the legislative veto).

³⁹⁹ *International Trade Agreements* at 59 (cited in note 391) (stressing the extensive consultations between executive and legislature under fast track procedures, with significant advance notifications and hearings).

⁴⁰⁰ See Lehmann, 98 *Yale L J* at 896-903 (cited in note 371) (proposing an arms control fast track procedure through which the Congress guarantees expeditious consideration of an agreement in exchange for heightened executive branch consultation during the negotiation process).

⁴⁰¹ Agreement on fast track procedures is not irrevocable. In the trade context, the Senate Finance Committee and the House Ways and Means Committee typically retain the power to vote at a critical juncture in the process to deny expeditious treatment for a pending document. *International Trade Agreements* at 59 (cited in note 391). Of course, the possibility that the Congress might renege on the agreed timetable would make the entire bargain less attractive to the executive.

process; each country would establish its own internal ratification procedures.⁴⁰²

E. Use a Modified Legislative Veto Process

The legislative veto has survived its apparent death knell in the *Chadha* decision.⁴⁰³ In fact, additional statutes, some of them in the area of foreign policy, have continued to incorporate new provisions of that sort in recent years.⁴⁰⁴ Even more common have been "report and wait" provisions, requiring the executive branch to notify Congress prior to the effectuation of some new regulation or other proposed standard. The sequence then affords the legislature a period of time to consider ordinary legislation that could overturn the pending provision.⁴⁰⁵ Arms control might profitably accommodate similar processes, even if the Supreme Court continues to disapprove the general concept of the legislative veto in other contexts.⁴⁰⁶

A treaty might provide, for example, that selected terms could be varied by agreement among the parties, and that each party could determine unilaterally what domestic measures were required to bring that change into force for itself. In the United States, legislation could create a presumption that any such implementing technical, administrative or procedural accord was to be automatically effective unless either house by majority vote passed a resolution of disapproval within a fixed time limit.⁴⁰⁷ If either

⁴⁰² See text accompanying note 156 (each country determines for itself what domestic procedures may be necessary to approve an agreement it has signed).

⁴⁰³ See text accompanying notes 315-22; William N. Eskridge and John Ferejohn, *The Article I, Section 7 Game*, 80 Georgetown L J 523 (1992) (supporting the legislative veto under a separation of powers analysis).

⁴⁰⁴ Louis Fisher, *Legislative Vetoes Enacted After Chadha*, Govt Div Rep No 87-389 GOV (Library of Congress, Congressional Research Service, Apr 28, 1987). But see *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise*, 111 S Ct 2298 (1991) (invalidating a novel type of legislative veto statute).

⁴⁰⁵ Informal consultation procedures have also accomplished similar goals. The legislature might require, as part of the political tradeoff involved in delegating power to the executive, that pending matters be submitted to the Congress in some fashion prior to effectuation. Consultation with the relevant committee or with selected leaders could then occur. Typically, if the legislators strongly object to the administration's proposal, it is modified or withdrawn. Dalton Interview (cited in note 246); Fisher, *Presidential Spending Power* at 73-74 (cited in note 353).

⁴⁰⁶ See Strauss, 1983 Duke L J at 805-06 (cited in note 328) (judiciary should distinguish use of legislative veto in foreign affairs context from other applications).

⁴⁰⁷ See Johnson, *The Making of International Agreements* at 138-39 (cited in note 64) (describing similar proposals in the 1970s for automatic legislative veto review of executive agreements). The Vienna Convention includes a similar type of "negative option" in the context of nations' responses to a proffered reservation to a treaty. Silence or inaction for

house disapproved, the President would be required to notify the other countries that the United States would not become a party to the amendment.

As a variant, focusing on the procedural rather than the substantive standards, the underlying legislation could simply require the President, in the face of a committee or one-house disapproval, to submit the negotiated text to the legislature as a treaty or executive agreement, rather than effectuating it unilaterally.⁴⁰⁸ In this model, the one-house vote is not truly a veto, since the President might still prevail in the subsequent voting on the approval of the modification. The process does, however, preserve the option for Congress to participate in a meaningful way in the assessment of the text's significance and the determination of the appropriate legislative vehicle for evaluating it.

As with the traditional legislative veto, this system provides both branches with some advantages. The executive can count on inertia as well as political expediency to defeat most resolutions of disapproval. Unlike in the process of securing advice and consent, the burden of coming forward here is with those who would defeat the President's proposal. Congress can count on participating in the process of shaping and revising international agreements, and whenever a resolution of disapproval is introduced, the prospect of a record vote will force attention. All partisans could benefit from a statutory timetable that would ensure relatively prompt votes, rather than open-ended delay. This version of the legislative veto does not tread too far on the President's conduct of foreign policy, for it cannot force the executive to initiate any practices or terms. It is merely a brake on the executive departing too quickly from the status quo that was previously approved by the advice and consent process.

F. Use a Modified Consultation Process

A final possibility is to preserve the concept of the non-amendment procedure, but to surround it with sufficient safeguards so that it does not escape meaningful congressional over-

one year is ordinarily deemed to constitute "acceptance" of the reservation, with significant legal consequences. Vienna Convention, Art 20, ¶ 5 (cited in note 128). Congress typically does not participate in the executive branch's decision whether to accept or object to other countries' reservations.

⁴⁰⁸ Alternatively, a political arrangement could be reached that dispenses altogether with formal votes of disapproval. The administration could consult with party leaders in the Congress and commit itself to honoring their preferences about the form of the agreement.

sight. This compromise would permit the executive to conclude and implement necessary changes with dispatch, but still retain loyalty to the separation of powers.

The first such safeguards measure would be a reporting requirement, similar to that incorporated in the Derwinski amendment.⁴⁰⁹ Here, the executive would be required to provide information—possibly in the form of annual reports—regarding the proceedings inside the various treaty implementation bodies, or in other diplomatic contacts, that might ultimately produce documents related to treaty modifications. The concept is to keep the Congress currently informed as the new documents evolve, rather than (as is now the practice) deferring any consultation and briefings until the non-amendment is drafted, signed, and effectuated. Congress is to provide its advice, as well as its consent. That requires the submission of timely information, drawing the legislature into the decisions about what modifications to develop, and about what form of document should be relied upon to implement them.⁴¹⁰

A second requirement is that the treaty should limit with greater precision the types of changes that may be effectuated through the informal process.⁴¹¹ The document (or its surrounding context)⁴¹² should indicate what particular terms are to be up for grabs in this way, what types of changes are contemplated, and what sorts of circumstances or experiences might justify the modifications.⁴¹³ Ideally, the treaty would indicate, perhaps paragraph by paragraph, whether the provisions could be altered without formal amendment, whether the contemplated changes would be “gap fillers” or “standards changes,” and what basis the parties would have for departing from the original agreement. For example, a treaty might provide that after experience with the first several on-

⁴⁰⁹ See text accompanying notes 68-69.

⁴¹⁰ But see Cooper, et al, U Miami L Rev at 195-96 (cited in note 312) (reporting requirements are sometimes unwise; secrecy in presidential actions is sometimes critical).

⁴¹¹ John B. Rehm, *Making Foreign Policy Through International Agreement*, in Francis O. Wilcox and Richard A. Frank, eds, *The Constitution and the Conduct of Foreign Policy* 134 (Praeger, 1976) (urging Congress to use greater care in delegating foreign affairs powers to the President, and to grant executive discretion more narrowly).

⁴¹² The Vienna Convention establishes that in interpreting an international agreement, parties shall also consider its “context,” including any contemporaneous instruments executed by the parties in association with the underlying treaty. Vienna Convention, Art 31, § 2 (cited in note 128).

⁴¹³ Note, 11 Hofstra L Rev at 811-15 (cited in note 280) (controversies have arisen regarding the extent to which a prior treaty did contemplate or authorize a particular type of subsequent executive agreement).

site inspections, the parties could agree to supplement the types of measuring equipment that the inspectors could bring, or the timing of notifications about their intended itinerary. But the parties could not use the informal modification route if they simply changed their minds about political calculations, such as the frequency of inspection or the degree of constraint on the inspectors' ability to go wherever their suspicions might lead them.⁴¹⁴

From this perspective, existing treaties illustrate both adequate precision and unacceptable over-generality in defining the scope of the changes. The INF Treaty, for example, permits parties to supplement the Elimination Protocol where they discover additional or better methods to destroy or dismantle excess arms;⁴¹⁵ although this provision does not specify the *reasons* why a particular change might have to be validated, it does somewhat confine the scope of the non-amendment. Similarly, the 1990 TTBT Protocol provides a good model in specifying that changes may be made in the calendar of notifications and the provisions for local logistical support for inspectors.⁴¹⁶ Again, the text could be more precise in suggesting the types of changes that would be warranted, but the existing language is not too far off the mark.

On the other hand, both of those treaties also incorporate other, more generic, language that would permit too much freedom to implement informal changes. The "viability and effectiveness" formula of the INF Treaty⁴¹⁷ and the comparably obscure language of the TTBT Protocol⁴¹⁸ are simply too broad and permissive. They potentially allow the negotiators to change the original terms in all sorts of un contemplated ways. Even worse is the language of the CFE Treaty, which also uses the "viability and effectiveness" formula, but this time the phrase is completely unconstrained by reference to any particular types of provisions or standards for modification.⁴¹⁹ The CFE Treaty is thus too much of an open invitation. The START agreement is similarly profligate and standar-

⁴¹⁴ In July 1991, the Bush Administration altered the United States' posture in the Chemical Weapons Convention negotiations, moving away from insistence upon unfettered on-site inspection and toward support of a more constrained verification system. Lionel Barber, *Chemical Arms Ban Proposals Diluted*, *Fin Times* 1 (Jul 24, 1991). As a modification in negotiating positions, this change was important enough; as a modification in a signed treaty, it would have required a new law-making process.

⁴¹⁵ INF Treaty, Elimination Protocol, Art II, § 10 (cited in note 28).

⁴¹⁶ 1990 TTBT Protocol, § XI, ¶¶ 2, 3 (cited in note 37).

⁴¹⁷ INF Treaty, Inspections Protocol, Art XI, § 4 (cited in note 28); *Id.*, Elimination Protocol, Art V, § 2(e).

⁴¹⁸ 1990 TTBT Protocol, § XI, ¶ 4 (cited in note 37).

⁴¹⁹ CFE Treaty, Art XVI, § 5 (cited in note 32).

dless in the use of the modifications power,⁴²⁰ and the Open Skies Treaty specifically provides that several of the most controversial and sensitive portions of the treaty will be available for thorough revision via informal means.⁴²¹

A third type of safeguard would be to specify some of the important operational details about the consultation process.⁴²² The legislative history of the treaty should define with precision whom the executive will consult, at what stages in the modification process, and at what level of seniority and formality.⁴²³ Probably the right groups to receive this type of briefing would be the six relevant congressional committees, although other members or caucuses, such as the Congressional Arms Control Observer Group,⁴²⁴ should be offered the opportunity to participate, too. Ideally, there would also be an understanding about what would happen in the event of disagreement.⁴²⁵ If the congressional staffs or members did not concur with the executive (or with each other) about the content or process of a particular modification, how would the controversy be resolved?⁴²⁶

⁴²⁰ See text accompanying note 211.

⁴²¹ Open Skies Treaty, Art X, § 5 (cited in note 105).

⁴²² See Koh, *The National Security Constitution* at 126-28 (cited in note 301) (critiquing the poor drafting of the War Powers Resolution that permitted evasion of the consultation provisions of earlier legislation).

⁴²³ See Jeremy J. Stone, *Presidential First Use is Unlawful*, 56 For Pol 94 (Fall 1984) (arguing that the President is required to consult congressional leaders prior to initiating use of nuclear weapons). See also International Agreements Consultation Resolution, S Rep No 95-1171 (cited in note 288) (expressing legislative interest in close consultation regarding the decision to present an international agreement in the form of a treaty or executive agreement).

⁴²⁴ The Observer Group lacks the formal status and the staff of a regular committee, so it should not play the primary role in the consultation process; however, its members have demonstrated a special interest in national security issues and have developed an expertise that could be helpful in the process of formulating policy. See Koh, *The National Security Constitution* at 167-69 (cited in note 301) (proposing establishment of a small "Core Consultative Group" of legislators whom the President could consult quickly and secretly on security matters).

⁴²⁵ In any real consultation mechanism, there is always the possibility that the legislators, after receiving the executive's presentations, will disagree with the proposed course of action—ascertaining their potentially discrepant views is, after all, a major purpose of the exercise. However, the "advice" portion of the constitutional requirement for senatorial "advice and consent" has long been underutilized, following President George Washington's first unsatisfactory attempts to consult the Senate in a meaningful fashion about a pending treaty. See Henkin, *Foreign Affairs and the Constitution* at 130-32 (cited in note 297).

⁴²⁶ See Carrol J. Doherty, *Sanctions Compromise Reached on Chemical Weapons Makers*, 49 Cong Q Weekly Rep 2805 (Sep 28, 1991) (in building a consultation mechanism into compromise legislation imposing sanctions on companies and countries who facilitate the proliferation of chemical weapons, Congress was aware that "the president customarily refrains from taking actions that are strongly opposed by the committee leaders").

In addition, the relevant information—or at least the portions that would not unduly frustrate ongoing negotiations inside the treaty implementation bodies—should be made available to the public.⁴²⁷ Appropriate documents should be disseminated and a public record should be created, through formal hearings, rather than closed briefings, wherever possible.

Finally, it is important to stress that for the consultation process to work, the Congress will have to be more attentive to the non-amendment process than it has so far been.⁴²⁸ On several occasions, the executive branch has concluded a modification agreement, dispatched it to Capitol Hill with a cover note offering briefings, and then waited patiently while the telephone did not ring. Members and their staffs will have to demonstrate greater fastidiousness, making it a point to monitor the ongoing negotiations and to scrutinize the finished products, even when no incendiary crisis is at hand. The right to conduct a more thorough legislative oversight becomes meaningless if Congress does not exercise it regularly.⁴²⁹

CONCLUSION

It is impossible not to be sympathetic to the plight of modern arms control negotiators. The treaty-making process is subject to unprecedented stresses these days, straining the creativity and patience of those who believe, correctly, that negotiated disarmament accords can play a vital role in promoting national security and global stability. Prolix treaty prose is both a symptom and a cause of national security problems, reflecting the country's now traditional over-emphasis on the interstices of verification and enshrining

⁴²⁷ But see Note, *Constitutional Limits on the President's Power to Interpret Treaties*, 78 Georgetown L J 1983, 2000 (1990) (danger in public release of documents intended as confidential reports from negotiators to senior executive branch officials).

⁴²⁸ See Rovine, 52 Ind L J at 409 (cited in note 294) (in the vast majority of cases, Congress does not wish to be consulted about an international agreement, because only a few treaties each year are important enough to spark interest); Note, 78 Georgetown L J at 2024 n 154 (cited in note 427) (some of the Senators stated their belief that the Senate did an exceptionally thorough, conscientious job in evaluating the INF Treaty).

⁴²⁹ Rehm, *Making Foreign Policy* at 134-35 (cited in note 411) (congressional role in foreign affairs may be best promoted through more frequent and aggressive use of the legislature's current powers); Koh, *The National Security Constitution* at 123 (cited in note 301) (congressional acquiescence helps explain the loss of legislative powers and the ascension of the presidency); Krent, 74 Va L Rev at 1260 (cited in note 350) (separation of powers was designed, in part, to promote accountability of Congress).

ing those details in a legal text that is too difficult to update and improve.⁴³⁰

Technology lurches ahead—not only providing novel, miniaturized weapons of unprecedented destructive power, but also opening new vistas for effective treaty verification. How can the arms control community possibly predict the next twist of military inventiveness? Similarly, we have surely not seen the last of the stunning global political tremors, as revolutionary changes unfold in the former Soviet Union, Eastern Europe and elsewhere, evoking previously impossible international accommodations. How can the negotiators craft agreements that could accommodate that unknown future political milieu? At the same time, treaty drafters are still impelled to fashion agreements of surpassing detail, injecting a false precision into the obese text, knowing that latent errors and omissions are inevitable.

In all of this, the domestic political process for creating and altering the binding arms reduction accords remains exceptionally turgid. The eighteenth-century institutions, prompted by a world in which communications were languid and world events proceeded at a leisurely pace, may seem ill-suited for the environment of intercontinental ballistic missiles and satellite telefax. Clearly, we have no need for additional artificial barriers in the domestic process for effectuating—and modifying—international agreements. Whether cast as treaty or executive agreement, the documents should be evaluated and approved or rejected promptly, without straightjacketing the legislature or the executive in unnecessary attention to minor details. The changes that have been adopted to date under the non-amendment procedure have uniformly been appropriate: they have been important enough to be worth pursuing, but small enough that Congress would not be agitated. But the propriety of the procedure remains questionable.

At the same time, we should also be more attentive to the domestic ratification procedures in other countries. When the major arms control developments were merely a bilateral phenomenon—and when Stalinism meant that the internal Soviet legislative procedures were merely a rubber stamp for the leadership's decisions—it was plausible for the United States Senate to ponder the negotiated documents in isolation. The world would wait, al-

⁴³⁰ See Rostow, 83 Am J Intl L at 748-49 (cited in note 305) (statutes, as well as treaties, in the foreign affairs area are becoming excessively detailed and unduly constraining).

beit sometimes impatiently,⁴³¹ to determine how the negotiated document would be twisted by our legislative review. Although most of our negotiating partners never fully understood the American concept of separation of powers, they learned grudgingly to accommodate the inherent delays.

Now, however, the stakes are higher and the complexities have multiplied. It is not only the American legislature that participates in, and threatens to micromanage, international agreements. The spread of democracy has inserted at least a somewhat autonomous parliamentary check into many other countries, too. Even in the republics of the former Soviet Union, the legislatures are now more like genuine deliberative bodies, flexing independent political muscle.⁴³² Other nations have studied American federalism and occasionally borrowed some of its institutions and practices, importing the delays and inconsistencies along with its other features.⁴³³

It is beyond the scope of this Article to opine how any other states ought to strike the balance between executive and legislative powers in the treaty-making and treaty-bending processes. But we must be aware that ours is not the only potential source of legislative oversight and disruption. If we insist upon a laborious process of formal amendment for every little change, and if other states ape our rigidity, the process of creating and sustaining these important accords will stultify. Perhaps there is some hope that other countries might tolerate an asymmetry in treaty modification processes: in some countries, the chief executive might be able to approve unilaterally a non-amendment, but in the United States, the legislature would have to participate in some fashion before

⁴³¹ The Soviet Union's cataclysmic invasion of Afghanistan in December 1979 perhaps provides a partial illustration of another state losing patience with the American ratification process. By that point, the signed SALT II Treaty had been pending before the United States Senate for six months, with no immediate end in sight, and observers differed over its eventual ratification prospects. Apparently, the Soviets simply gave up on the treaty ever entering into force, or they calculated that it was no longer worthwhile compared to their other security objectives. In any event, the Soviet invasion caused the Carter Administration to defer the SALT II ratification effort, and the treaty was never taken up by the full Senate. *ACDA Treaty Book* at 263 (cited in note 5).

⁴³² Morrison, *Natl J* at 2078 (cited in note 82).

⁴³³ Other aspects of federalism have also crept into other nations' new constitutions, further complicating the process of negotiating disarmament agreements. See, for example, Francis X. Clines, *Soviet Republics Back Gorbachev on Nuclear Cuts*, *NY Times* A8 (Oct 9, 1991) (four Soviet republics participated separately in formulating arms reductions proposals, preventing the traditional monolithic behavior).

new terms could be ratified.⁴³⁴ In any event, however, we must not allow the process to become more leaden than it already is.

Looming on the horizon is another, even more complex, ramification of the problem. That is, in some international agreements, the United States has, in effect, transferred a portion of its erstwhile national decisionmaking autonomy to some sort of supranational institution, committing our nation to accept its decisions as binding. In so doing, we are ceding to that institution the ability to interpret laws—and thereby to make laws—without fresh congressional participation. In effect, the process delegates power not merely to the United States chief executive, but out of the country altogether, into the hands of judges, policymakers or others not sworn to uphold the United States Constitution.⁴³⁵

The Charter of the United Nations provides the first vivid illustration of this practice, since all member states are committed “to accept and carry out the decisions of the Security Council.”⁴³⁶ The permanent members’ veto power ensures that, as a practical matter, the United States cannot be compelled to act against its will, but the structure of a transfer of sovereign power is clear.⁴³⁷ More directly, in documents submitting to the jurisdiction of the International Court of Justice, parties commit themselves to international adjudication, accepting the possibility that they may lose a case on the facts or on the law.⁴³⁸ When that occurs, the state no

⁴³⁴ Many important multilateral arms control agreements do ensure a privileged position for the United States or other leading countries. The LTBT, for example, provided that an amendment could enter into force only when it is approved by a majority of the parties, and that such majority must include the United States, the Soviet Union, and Great Britain. LTBT, Art II (cited in note 9). In the modern era, however, it may not be so politically feasible to sustain special privileges for selected states, as the principle of equal sovereignty has become strengthened. A treaty could, however, simply leave it up to each state to decide for itself what internal procedures were necessary for it to deposit an instrument accepting a proposed amendment, and perhaps different states would come to different solutions.

⁴³⁵ See Restatement at § 102, Comment g and Reporters’ Note 3 (cited in note 47) (international organizations such as the International Monetary Fund and the International Civil Aviation Organization have authority to promulgate compulsory resolutions, binding upon the United States and other members); Henkin, *Foreign Affairs and the Constitution* at 194-96 (cited in note 297) (exercise of legislative powers by international organizations is constitutionally valid).

⁴³⁶ UN Charter, Art 25 (cited in note 235).

⁴³⁷ Even the General Assembly, where the United States has no veto power, has some authority to make binding decisions, possibly adverse to American interests. *Id.*, Art 17 (General Assembly approves the budget of the organization).

⁴³⁸ Carter and Trimble, *International Law* at 276-79 (cited in note 324) (reprinting United States and other declarations of submission to the International Court of Justice). The United States has withdrawn from the compulsory jurisdiction of the ICJ, but still remains eligible to be a party to litigation there, pursuant to the dispute-resolution provi-

longer has control of its own destiny: it has granted the ICJ—not its own chief executive—the power to state authoritatively the content of the international obligations.⁴³⁹

More recently, this trend has accelerated. In the Canada-United States Free Trade Agreement,⁴⁴⁰ for example, the establishment of an independent dispute resolution mechanism was a central condition.⁴⁴¹ This body is authorized to determine the proper construction of anti-dumping and countervailing duty clauses with no recourse to United States courts.⁴⁴² Again, in consenting to the treaty, the Senate is transferring power not simply to the President, but beyond our shores, as an autonomous international body will effectuate the agreement.⁴⁴³ This process of construction and interpretation inevitably changes the treaty as surely as does a deliberate modification (at least a “gap-filling” modification, if not a “standards-changing” one).

The move toward creating that sort of supranational institution—enshrining the equality of states by requiring each of them to surrender to an impartial international authority—is likely to continue. The General Agreement on Tariffs and Trade already incorporates something of this power,⁴⁴⁴ and other pending agreements might do so as well.⁴⁴⁵ In each instance, in ratifying the accord, the legislature is delegating the power even further afield than any arms control agreement has yet envisaged.

sions of many other treaties or to the submission of a particular case. *Id.* at 298-300 (statement by Legal Advisor Abraham D. Sofaer to the Senate Foreign Relations Committee).

The United States-Iran Claims Tribunal provides another illustration of an international judicial forum to which the United States has voluntarily ceded some sovereign authority, accepting the risk that a case may be decided adverse to American interests. *Symposium on the Iran-United States Claims Tribunal*, 16 L & Pol Intl Bus 667 (1984).

⁴³⁹ See *Role of the Senate* at 130-39 (cited in note 64) (assessing United States participation in a variety of judicial dispute-resolution mechanisms).

⁴⁴⁰ Canada-United States Free Trade Agreement, Dec 22-23, 1987, 27 ILM 281.

⁴⁴¹ Carter and Trimble, *International Law* at 377-78 (cited in note 324) (Canada sought creation of a binding dispute resolution mechanism, free from the possibility of appeal to American courts); J.G. Castel, *The Settlement of Disputes Under the 1988 Canada-United States Free Trade Agreement*, 83 Am J Intl L 118 (1989).

⁴⁴² Canada-United States Free Trade Agreement, Ch 19 (cited in note 440).

⁴⁴³ Senator Robert Byrd questioned the constitutionality of the delegation of power. Carter and Trimble, *International Law* at 387-88.

⁴⁴⁴ See Stuart Auerbach, *Raising a Roar Over a Ruling*, Wash Post D1 (Oct 1, 1991) (GATT expert panel concludes that United States trade sanctions against Mexican tuna industry constitute a violation of international standards, exposing United States to liability).

⁴⁴⁵ See Panel on the Law of Ocean Uses, *Statement by Expert Panel: U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 Am J Intl L 438 (Apr 1987) (recommending United States participation in a compulsory dispute resolution mechanism for the law of the sea).

There is no immediate prospect that arms control will imitate those other agreements.⁴⁴⁶ In the sector of national security, countries are especially jealous about preserving their unfettered autonomy.⁴⁴⁷ But if Congress may delegate power that expansively, authorizing international trading authorities to make business and commercial law for the United States, why should it not likewise be free to make the President its agent in formulating future disarmament treaty terms with no requirement for subsequent legislative re-approval? How can we fashion standards that will encourage and enhance United States participation in these vital global organizations, committing ourselves to the international rule of law, without surrendering too much of the Congress's checks and balances?

In the final analysis, the Administration's new proposed formula, permitting the executive to modify arms control agreements through expeditious mechanisms other than formal amendment, is a plausible, attractive, and intelligent idea. It is not, however, quite the idea that the Framers had built into the Constitution. In our system, the executive is supposed to "bother the Senate about every little point," and the value of efficiency takes a back seat to the principle of checks and balances. The Senate will have to perform its own triage function, assessing how much time and energy to devote to a proffered modification. It cannot assign that operation to executive branch negotiators. It is not for the executive—or, for that matter, for the legislature—to worry about overburdening the Senate with a raft of relatively minor modifications to a run of arms control agreements. Congress will simply have to do its job.

During the 1988 INF Treaty ratification hearings, Senator Nunn probed how anyone could distinguish, under the Administration's proposals, between a small, minor perfecting modification that could be effectuated informally, and a larger, more substantial alteration that would prompt invocation of the formal amendment process.⁴⁴⁸ "[W]here [do] we draw the line?" he asked,⁴⁴⁹ and

⁴⁴⁶ W.E. Butler, *Ensuring Compliance with Arms Control Agreements: Legal Responses*, in Butler, ed, *Control over Compliance with International Law* 31, 34-36 (Martinus Nijhoff, 1991). See Trimble, 102 Harv L Rev at 897-912 (cited in note 132) (proposing creation of an international institute to resolve disputes arising under arms control agreements).

⁴⁴⁷ Falk, 1 Am U J Intl L & Pol 18 (cited in note 239).

⁴⁴⁸ *NATO Defense and the INF Treaty*, Hearings and Meetings Before the United States Senate, S Rep No 100-312, 100th Cong, 2d Sess 411 (1988).

⁴⁴⁹ *Id.*

others have wondered the same thing.⁴⁵⁰ The suggestion here, based on the experience to date, is to draw the line where the Constitution first drew it two hundred years ago: someplace very close to Congress.

⁴⁵⁰ Id (questions from Senator Wirth); Steiner Interview (cited in note 166).